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— IN THE —

United States Circuit Court of Appeals for the Ninth Judicial Circuit

FEBRUARY TERM 1917

LUMBERMEN'S TRUST COMPANY,
Trustee, *Appellant,*

—vs.

TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA, a corpo-
ration, COMMONWEALTH TITLE
TRUST COMPANY, a corporation,
HORACE FOGG, FRED S. FOGG,
HERBERT GOVE and ALVA FOGG,
administratrix of the estate of
Franklin Fogg, deceased,
Appellees.

NO. 54 E.

FILED
SEP - 4 1917

F. D. MONCKTON,
CLERK.

APPELLANT'S BRIEF

*Upon Appeal from the United States District Court
for the Western District of the State of
Washington.*

FRANK H. KELLEY, JOHN H. HALL,
ROBERT M. DAVIS, FRANK C. NEAL,

For Appellants.

CHARLES O. BATES,
CHARLES T. PETERSON,

For Appellees.

—IN THE—
**United States Circuit Court of Appeals
for the Ninth Judicial Circuit**

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APPELLANT'S BRIEF.

This appeal presents for determination the validity of certain agreements, corporate and individual, between parties engaged or interested in the abstract business in Pierce County, Washington. Briefly stated the material and controlling facts are as follows:

1. The abstract business consists of the preparation and sale of a condensed statement in writing of the material elements of instruments filed of record which affect the title by which any given parcel of realty is held. In practice, persons engaged in this business make or possess such condensed information by taking the material facts from the official records in the

office of the County Auditor who is the official custodian thereof and the recorder of deeds. Such information in condensed form is known as "take-offs" and in addition thereto abstractors, other than the auditor, make a tract index which is a convenient and perhaps necessary aid to the prompt preparation of a correct abstract in that it shows a chain of title for each particular parcel, while the auditor keeps a grantor and grantee index only to the official records.

Such abstracts are prepared only on special order for a particular tract and consist of copies, attached together, of the condensed statement of the contents of each instrument of record affecting the title, together with a certificate of the abstractor that the abstract contains all that exists of official record which purports to affect the title to the parcel in question.

The charge for these abstracts is based upon the number of instruments abstracted, the established price being \$1.00 per instrument. For the convenient and prompt preparation of abstracts, persons in the business are accustomed to keep on hand a number of copies of instruments in frequent demand which are known as "stock"; and by taking from "stock" the copies needed and adding thereto copies of particular instruments not kept in stock, abstracts are completed. Such abstract when prepared has no general market value, but has a special value to persons who are interested in the particular tract to which it pertains. In case the abstract relates to a plat, addition or tract in which conveyances are frequent, the abstract may have a slightly broader value in that it shows the general title to the whole plat,

addition or tract which is common to all the parcels thereof.

2. By the laws of Washington these public records are open to all, without charge, who desire to inspect them, or search titles, or prepare abstracts of title therefrom; and the auditor is required by law to keep such indices of the records as may be necessary for the convenient use of the records for any or all of these purposes. The law further provides that any one paying the fee therefor may require the auditor *to prepare and certify* to an abstract of title, and if the auditor neglects or refuses so to do, or if the abstract is incomplete or defective the *auditor and his bondsmen* are liable to the party aggrieved for damages occasioned thereby.

Requests for and inquiries relating to abstracts have been made frequently to the auditors, but no abstracts have been prepared by them of recent years, their custom being to refer such requests and inquiries to the abstract companies.

3. Prior to December, 1909, three incorporated companies were engaged actively in the abstract business in Pierce County. The oldest was the Commonwealth Title Trust Co., owned and controlled by the defendants Foggs and Gove, which had been in the business for many years. The Title Insurance and Investment Co. of *Washington* was owned and controlled by A. D. Willoughby and O. M. Smith. The Wilson Title and Abstract Co. was owned and controlled by R. C. Wilson,

The Commonwealth Company's powers under its articles of association were very broad, and it was authorized particularly to acquire the good will, rights, property and assets of any concern dealing in abstracts or owning an abstract plant. The Title Insurance and Investment Company of Washington was authorized by its articles to maintain and operate an abstract plant, to purchase or sell abstract plants, and generally to deal in and with all matters pertaining thereto. The powers of the Wilson Company do not appear in evidence and are unimportant in this case.

4. In December, 1909, defendant Franklin Fogg for the Commonwealth Company and A. D. Willoughby had negotiations with R. C. Wilson which resulted in the lease of the Wilson Co.'s plant to Fogg and Willoughby for a term of five years at an agreed rental, with an option to purchase the plant within two years at an agreed price, and with provisos for keeping the plant up to date and free from liens during the term of the lease. On December 7th, 1909, Willoughby assigned his interest in this lease and option to Franklin Fogg who agreed to indemnify and save harmless Willoughby from any loss or liability under the lease. That Franklin Fogg ever formally parted with his interest in the Wilson lease and option, does not appear; but it does appear that the Commonwealth Co. paid the rental under and during the term of the lease. The option to purchase was not exercised, but the lease ran its full term and at its expiration the plant was leased to the Tacoma Title Co. as hereinafter appears.

In December, 1909, the Foggs and Gove entered into negotiations with Willoughby and Smith which resulted in the sale of the plant, good will and fixtures of the Title Insurance and Investment Co. of *Washington* to the Title Insurance and Investment Co. of *Tacoma*, a corporation organized at the request and for the convenience of the Foggs and Gove to take title to the property purchased and to execute notes and a mortgage to secure the purchase price. The stock of this company was subscribed by Willoughby and two dummies who, on December 30th, 1909, turned over all its stock to the stockholders of the Commonwealth Title Trust Co. who divided it among themselves in proportion to their holdings in the Commonwealth Co. At the time he subscribed for the stock, Willoughby received from Fred S. and Franklin Fogg an agreement to save him harmless by reason of his subscription.

The purchase price of the plant was \$100,000, payable \$10,000 in cash, \$10,000 in one year, \$5,000 annually for eight years and a final payment of \$40,000 in nine years; with interest on deferred payments at 7% payable semi-annually. To secure the deferred payments, notes of the Title Insurance Co. of *Tacoma*, and a chattel mortgage of the property purchase, *together with a set of current files of an estimated value of \$25,000* (of use in and complementary to the plant) were made by the Title Insurance and Investment Co. of *Tacoma* to the Title Insurance and Investment Co. of *Washington*. *These current files were the property of the Commonwealth Title Trust Co., which contributed them to the security of the mortgage.*

The capital stock of the Title Insurance and Investment Co. of Tacoma was only \$5,000, but the company immediately made the initial payment of \$10,000 and secured title to the current files worth \$25,000, all as it appears from the Commonwealth Title Trust Co. or its stockholders.

6. The mortgage provided that the plant should be operated as a going concern, kept up to date, and every endeavor made to build up its business and increase its good will. *To insure the proviso that the plant be kept up to date and properly posted and indexed, the mortgagee was empowered to nominate a competent person to be employed by the mortgagor for these purposes, but for no other purposes whatsoever.*

H. H. Gove resigned as an officer of the Commonwealth Title Trust Co. and took the active management of The Title Insurance and Investment Co. of Tacoma, whose business was thereafter conducted in the interests of the stockholders of these corporations, *who were identical*. Price cutting ceased, but there was no increase in the scale of charges nor any intent or purpose to make any increase.

The Title Insurance and Investment Co. of Tacoma held no meetings and elected no officers. Its by-laws called for five trustees, but none were ever elected. The affairs of the company were attended to by Gove and Fred S. Fogg as "trustees," apparently for those holding the stock of the two corporations.

7. In 1910, a competitor, the Tacoma Title Co., entered the field in active competition, doing from 10

per cent to 20 per cent of the business. In 1914, at the expiration of the Wilson lease, this company took the Wilson plant under lease and has since that time operated it, doing about 40 per cent of the business.

8. The payments of principal and interest under the chattel mortgage of 1909 were made until July, 1911, when, the Foggs having complained that the abstract business was falling off because of the general depression, and that the Tacoma Title Co. had entered the field, they were unable to meet the payments and some relief was necessary. They proposed an amalgamation of the companies, the mortgagee to take preferred stock in place of the mortgage indebtedness. Other propositions were considered, the negotiations being an endeavor on the part of the stockholders of the Title Insurance and Investment Co. of Tacoma and the stockholders of the Commonwealth Title Trust Co. to extend the time of the payment of the mortgage indebtedness, to modify its terms by reduction of the interest rate and release from the obligation to maintain the business as a going concern, and to avoid a foreclosure. The holders of the mortgage, although willing to modify its terms, sought to improve their security and to obtain the payment of the indebtedness. These negotiations resulted on December 2d, 1911, in the contracts in suit, the substance of which, in brief, are as follows:

(a) The holders of the chattel mortgage of 1909 satisfied it, and surrendered nine notes of the Title Insurance and Investment Co. of Tacoma aggregating \$80,000 and payable at yearly intervals to 1919 with interest at 7 per cent payable semi-annually.

(b) The Title Insurance and Investment Co. of Tacoma executed a new series of notes aggregating \$80,000, bearing interest at 5% payable semi-annually, and payable in annual installments of \$2500, the first being payable December 7th, 1915; the interest on the whole indebtedness between December, 1911, and December, 1915, being payable semi-annually, and thereafter semi-annually on the net amount due after payment on the principal; any default, after one year's grace, in the payment of either principal or interest, to mature the entire indebtedness at the option of the holders of the notes. The notes provided for attorneys' fees in the usual form.

(c) To secure the payment of these notes an agreement was made that the abstract plant should be boxed and delivered to a trustee in Portland in whose custody it should remain in pledge until the indebtedness was satisfied or a court should decree a foreclosure. An appropriate corporate resolution of the Title Insurance and Investment Co. of Tacoma, authorizing the notes and the pledge of the property, was passed at a meeting of the corporation at which all its stockholders were present and consented thereto.

(d) Further to secure the payment of this indebtedness, the Commonwealth Title Trust Co. agreed to guarantee the payment of the semi-annual installments of interest up to and including December 7th, 1915, and the payment of principal and interest up to and including 1921, in accordance with the tenor of the notes; and further agreed to make the necessary "take-offs," etc., and to index and bind the same, and deliver them to

the trustee in Portland, to keep the plant up to date, with a proviso, that as long as the payments of principal and interest were made promptly, this agreement should remain in abeyance.

(e) To secure the performance of the undertakings of the Commonwealth Co., that company made a mortgage of certain real property it owned in Tacoma in the sum of \$15,000. Some question having arisen as to the corporate power of the Commonwealth Co. to make these guarantees and to execute this mortgage, the individual defendants guaranteed that it had such powers and that its agreements were for a good, valid and sufficient consideration and were in all respects valid and binding on the corporation. By an appropriate corporate resolution, the Commonwealth Title Trust Co. was authorized to enter into these agreements and to execute this mortgage, at a meeting at which all its stockholders were present and consented thereto.

9. The semi-annual payments of interest were made by the Commonwealth Title Trust Co. up to and including July, 1913. The semi-annual payment of interest due December, 1914, was defaulted, although promises to pay were made. The semi-annual payment of interest due July, 1915, was defaulted. In the Spring of 1915 some of the individual defendants were advised by counsel that the agreements in suit were void as monopolistic, and in restraint of trade, and in restraint of competition. Further attempts to compromise and adjust the matters in controversy having failed, suit was brought in the court below which sustained the contention of the defendants that the agreements were void

as in furtherance of a monopoly and in restraint of competition and of trade. A decree having been entered dismissing the bill, the plaintiff appeals.

ARGUMENT.

The court below found all of the several transactions between the parties were for the purpose of creating a monopoly in the abstract business in Pierce County, and were therefore illegal and void. The court found this taint attached to the sale and mortgage of 1909 and that all subsequent agreements were in furtherance of the original unlawful purpose. The decree is based upon this finding and other matters found and discussed by the court were unnecessary and *obiter dictum*.

We submit that the court below was in error in this fundamental proposition. The abstract business is such that its very nature makes its monopoly impracticable. It is merely a convenient compilation, from sources open to all, of information relating to title to real property, which does not pretend to state in whom that title is, but merely certifies that the facts stated are all that exist of official record purporting to affect the title. It is a skilled service in so far as ability is involved to determine what facts are material, otherwise it is merely clerical. It creates no commodity having an intrinsic value, but is merely a compilation of interest to those immediately concerned. It is analogous to the reports of legal proceedings, legislative enactments, executive documents and other public matters. It bears some analogy to the collection of news, commercial reports, etc., but is of less general value. The information it contains must be di-

gested and considered to deduce therefrom the character of the title and in whom it is—a service which requires usually a legal expert, who, if competent to render this service, would be competent to obtain the facts at first hand from the official records. Thus every attorney-at-law is an inchoate abstractor of titles, who refrains from doing the work only so long as others do it more cheaply and conveniently. Any attempt of the abstractors to charge exorbitantly, or to render anything but a convenient service, would bring every attorney into the field as a competitor. Indeed, anyone may go into the abstract business at any time. The official records are open to him. If he chooses he may indirectly compel others in the business to give him necessary information. It is common knowledge that, particularly in the younger states, titles spring from the federal government or from the state. Usually donation claims, large tracts, plats, additions, etc., are the secondary sources of title. One needs only to obtain the use of a single abstract pertaining to a single parcel within each of these secondary sources, to have at his command all that the established abstractor has, and may run the title to any parcel within these sources from the official records rapidly, conveniently and at small expense. If his certificate is acceptable, his abstract is as good as another. Every lawyer in active practice accumulates in the course of time abstracts which cover these secondary sources of title so that, if the abstractors cease to be a convenience, his clients may become independent of them immediately.

Such abstracts cannot be considered a commodity. They are like letters, correspondence, opinions in writ-

ing, compilations, etc., of value only to the parties in interest. The certificate is a matter between the abstractor and his patron, creates no privity of contract in third persons, gives rise to no cause of action except between the abstractor and his patron, and therefore adds nothing of general value to the abstract as a commodity. The business is one of mere personal service and occupation. There is no property affected with a public interest; therefor there can be no basis laid for a charge of monopoly.

Bremerton Development Co. vs. Title Trust Co.,
68 Wash. 268.

National Savings Bank vs. Ward, 10 Otto 195,
s. c. 25 Law Ed. 621.

Dundee Mortgage & Trust Co. vs. Hughes, 20
Fed. 39.

Thomas vs. Guarantee Title & Trust Co., 81 Ohio
St. 432, s. c. 91 N. E. 183, s. c. 26 L. R. A. (N.
S.) 1210.

Rohlfe vs. Kasemier, 140 Iowa 182, s. c. 17 Ann.
Cas. 750.

State vs. Associated Press, 159 Mo. 410, s. c. 60
S. W. 91, s. c. 51 L. R. A. 154, s. c. 81 Am. St.
Rep. 368.

State vs. Duluth Board of Trade, 107 Minn. 506,
s. c. 107 N. W. 395, s. c. 23 L. R. A. (N. S.)
1260.

Forrest Photo Co. vs. Hutchinson Grocery Co.,
108 S. W. (Texas) 768.

State vs. Frank, 169 S. W. (Ark.) 333.

Davies: "*Trust Laws and Unfair Competition*,"
p. 169.

Banker vs. Caldwell, 3 Minn. 94.

Vallette vs. Tedens, 122 Ill. 607, s. c. 14 N. E. 52,
s. c. 3 Am. St. Rep. 502.

Heinson vs. Lamb, 117 Ill. 549, s. c. 7 N. E. 75.

Joyce: "*Monopolies*," Sec. 69 and 99.

In *Bremerton Development Co. vs. Title Trust Co.*, 68 Wash. 268, an action for damages for defects in the abstract, the court states the rule to be: "An abstractor's liability for damages arising from negligence or want of due care in making an examination of records and in preparing an abstract of title is contractual. The weight of authority is that such liability extends only to the person by whom the abstractor was employed. There must be a contract or privity of contract to create the liability as it does not originate in tort." This is the law of the place of the contract. The principle which underlies the decision completely negatives the proposition that an abstract is a commodity of intrinsic market value which is transferred from one to another by delivery. The controlling principle is that the preparation of an abstract is a contract for a personal service which gives no right of action except between the parties. The opinion cites with approval—

Thomas vs. Guarantee Title & Trust Co., 81 Ohio St. 432, in which the complaint alleged that one Cavanaugh held a life estate in realty the title to which he employed the defendant to search. Defendant certified to Cavanaugh that his title was good. It alleged fur-

ther a custom that the owner procures an abstract and certificate of title, if he wishes to sell or encumber the property; and that the lender or vendee relies on such abstract and certificate; that subsequent vendees or lenders rely on mere extensions of the abstract without a re-examination of the prior history of the title; and that *such abstracts and certificates circulate in the community from assignors to assignees, who rely upon them for an indefinite period of time.* It will be noted that these allegations are in effect that the abstract is a commodity having an intrinsic and general market value. In substance, it is equivalent to the testimony of defendants in the case at bar as to the nature, character and use of abstracts and the abstract business. (Testimony of Fred S. Fogg, Record, pp. 126, 128.) A demurrer having been sustained, the Court, having announced the underlying principle of decision in conformity to the rule adopted by the Supreme Court of Washington in the Bremerton case, says: "The plaintiff in error frankly disclaims any reliance upon the contract and claims his rights exist independently of the contract. The theory is that the defendant, knowing the custom alleged, a legal duty was thereby imposed upon it to make the abstract accurate; and that therefore the certificate by defendant to its employer would inure to the benefit of all subsequent grantees by 'a natural continuous sequence uninterruptedly connecting the breach with the damage as cause and effect.' It is at this point, as we think, the theory of the plaintiff breaks down. In the first place, it is elementary law that usage and custom cannot create a contract or liability where none

otherwise exists. * * * In the second place, in order to uphold the theory it would be necessary to ignore the doctrine of *caveat emptor* which requires a vendee to protect himself by investigation and express covenants. *The transaction which was the basis of this action was a mere private contract of employment for services upon a subject about which the public were not and could not be concerned.*" This language most surely negatives any theory that an abstract of title can be considered a commodity in the sense that its preparation can be made the subject of a monopoly.

In *National Savings Bank vs. Ward*, 10 Otto 195, an attorney was employed by one who claimed ownership, to search and certify to title. The attorney negligently but not fraudulently failed to find a recorded deed by claimant to another, and certified to title in claimant. Plaintiff loaned on faith of the certificate and sued the attorney for damages sustained thereby. The Supreme Court held the action would not lie because the contract was for a personal service for breach of which only those in privity could maintain an action.

In *Dundee Mortgage & Trust Co. vs. Hughes*, 20 Fed. 39, the same point was decided on the same ground in this circuit.

Rolfe vs. Kasemier, 140 Iowa, 182, was an indictment of physicians and surgeons, who had agreed to a scale of charges for medical and surgical services, under Iowa statute forbidding agreements to fix prices of any commodity, etc. Held, personal services, whether skilled or unskilled, not within purview of statute and not subject to monopoly at common law.

State vs. Associated Press, 159 Mo. 410, was a mandamus proceeding to compel defendant to supply its news service and compilation of current information. The opinion is exhaustive, discusses fundamental propositions, holds defendant deals in no commodity, but renders a personal service, and is not within the terms of any statute or principle of common law, stating the rule to be: "Unless there be property to be affected by a public interest, there can be no charge of monopoly."

State vs. Duluth Board of Trade, 107 Minn. 506, was a prosecution under the Minnesota statute forbidding any contract, etc., to fix the price of any article, commodity or utility. Defendant maintained an organization for brokers in grain, gathered current information of trade conditions, market quotations, etc., and made rules requiring members to trade only with fellow members, to abide by a scale of charges, etc. Held, not to be within the terms of the statute, since it dealt in no commodity, but merely rendered personal services.

Forrest Photo Co. vs. Hutchinson Grocery Co., 108 S. W. 768, was where the plaintiff contracted to furnish to customers of defendant an art calendar on orders signed by defendant and to refrain from furnishing a like service to any other grocery concern. In defense to a suit on the contract, monopoly under the Texas statute was pleaded. The defense was held not to apply since the contract called for a service by plaintiff and not the sale of a commodity.

State vs. Frank, 169 S. W. 333, was a prosecution under the Arkansas statute prohibiting price fixing of

any article of manufacture, commodity, or any article or thing whatsoever. Defendants were proprietors of laundries who had agreed to a price scale and maintained it, but agreed further to a lower scale in a nearby town where there was competition. The Appellate Court held the subject matter of the contract was not a commodity within the meaning of the statute, and was merely a service, the business being rather to make linen clean than to make clean linen.

Davies' "Trust Laws and Unfair Competition," is an extensive treatise and compilation of the federal, state and foreign constitutional and statutory enactments by Joseph E. Davies, Commissioner of Corporations of the Department of Commerce of the Federal Government, and is published by authority of the Government by the Government Printing Office. On page 169 Mr. Davies has a compilation and comparison of the statutes of the several states and in a foot-note says that the words "articles" and "commodity" in these acts are to be construed as synonyms with natural products, manufactured products, and goods, wares and merchandise. Indeed, in two states (California and Colorado) the statute makes the specific declaration.

Banker vs. Caldwell, 3 Minn. 94, holds that an abstract of title is not a commodity, but is merely a service rendered for a compensation.

Vallette vs. Tedens, 122 Ill. 607, holds that when one requires an abstract of title, the abstractor from whom he procures it enters into a relation of trust and confidence second only to that of a lawyer to his client. In

this case the abstractor found an outstanding superior title to property which his employer owned, and purchased it. A resulting trust was held to exist by operation of law in favor of the employer. Could this result have been reached if the abstract was a mere commodity?

Heinson vs. Lamb, 117 Ill. 549, defines an abstract: "In a legal sense an abstract is a mere summary or epitome of the facts relied on as evidence of title."

Mr. Joyce, in his work on "Monopolies," states the rule adopted in several of the opinions cited: "At common law personal service and occupation cannot be the subject of monopoly; unless there is property to be affected with the public interest, there is no basis laid for the fact or charge of monopoly." Sec. 69. "Every contract or combination does not necessarily operate in restraint of trade or commerce or constitute a monopoly. To the extent that a contract prevents a vendor from carrying on a particular trade, it deprives the community of any benefits it might derive from his entering into competition. But where the business is open to all, there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. They confer no special or exclusive privilege." Sec. 99.

The opinion of the court below contents itself with a quotation from Shakespeare, a general definition from a dictionary, and a citation from Cyc. to determine adversely to our contention the fundamental question in the case at bar. In the light of reason and the weight of decided cases which we cite, we believe the preponderance of authority is with us. Indeed, Court of Appeals

of Texas has declared the dictionary's general definition obsolete; and that "commodity" in the purview of law of monopoly means something manufactured and the subject of barter and sale.

Queens Ins. Co. vs. State, 86 Texas 250.

If the fundamental facts were not sufficient to show the fundamental error of the court below, the statute law of Washington would supply the deficiency. These laws recognize the public character of records of title to realty, provide for freedom of use of the records, provide for necessary indexes of the records for the purpose of searching titles, taking notes from the records and *preparing abstracts of title*. In addition to the personal right of every citizen so to inspect and use the records, the law provides that the County Auditor, when requested so to do, shall *prepare and certify to an abstract of title*, and further provides that for refusal or neglect so to do, or for any omissions or defects in the abstract *the auditor and his bondsmen shall be liable to the party aggrieved for the damages occasioned thereby*. Private abstractors are personally liable to the person to whom their certificate is given and only to the extent of their property not exempt from execution. The auditor is liable to any one who suffers a damage by reason of his refusal, neglect or defect. The auditor therefore is compelled by law to do all and more than any private abstractor does, and his liability and that of his bondsmen is broader. How, then, can a monopoly be based upon a service which it is the public duty of a public official to perform? These provisions of Washington law are as follows, in full:

DUTIES OF AUDITOR AS CUSTODIAN.

The County Auditor, in his capacity of recorder of deeds, is sole custodian of all books in which are recorded deeds, mortgages, judgments, liens, encumbrances, and other instruments in writing, indexes thereto, maps, charts, town plats, survey, and other books and papers constituting the records and files in said office of recorder of deeds; and all such records and files are and shall be matters of public information, free of charge to any and all persons demanding to inspect or to examine the same, or to search the same for titles of property. It is said recorder's duty to arrange in suitable places the indexes of said books of record, and when practicable, the record books themselves, to the end that the same may be accessible to the public and convenient for said public inspection, examination and search, and not interfere with the said auditor's personal control and responsibility for the same, or prevent him from promptly furnishing the said records and files of his said office to persons demanding any information from the same. The said auditor or recorder must and shall, upon demand and without charge, freely permit any and all persons during reasonable office hours, to inspect, examine and search any or all of the records and files of his said office, and to gather any information therefrom, and to make any desired notes or memoranda about or concerning the same, and to prepare an abstract or abstracts of title to any and all property therein contained. *Balinger & Remington Code*, p. 8795.

TO SEARCH RECORDS AND FURNISH CERTIFICATE, WHEN

The auditor must, upon the application of any person, and upon the payment or tender of the fees there-

for, make searches for conveyance, mortgages, and all other instruments, papers, or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers, and notices, the dates thereof, the year, month, day, hour, and minute they were recorded or filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded. (Remington & Ballinger's, Sec. 8792.)

LIABILITY FOR NEGLECT OF DUTY.

If any county auditor to whom an instrument, proved or acknowledged according to law, or any paper or notice which may by law be recorded, is delivered for record

* * *

4. Neglects or refuses to make the searches and to give the certificate required by this chapter; or if such searches or certificate are incomplete and defective in any important particular affecting the property in respect to which the search is requested; * * *

He is liable to the party aggrieved for the amount of damage which may be occasioned thereby. (Remington & Ballinger, Sec. 8793.)

If what has been said is not enough to show clearly that the abstract business is inherently incapable of being monopolized, the facts in evidence show the practical impossibility. If a monopoly was formed, it was on December 30th, 1909. In the Spring of 1910, the Tacoma Title Co. entered the field and in a short time was doing from ten to twenty per cent of the business. In 1911 its business had increased so that the "monop-

oly" was unable to meet fixed charges and running expenses. After 1911 the new company was doing forty per cent of the business and in 1914 took over the lease of the Wilson plant which the "monopoly" could no longer carry. The new company's business seems to have grown constantly and have been profitable and satisfactory; the "monopoly" seems to have languished and grown poorer day by day until its promoters sought to get from under by pleading their own wrong-doing. The public never has suffered in any particular. (See Record, p. 6, stipulated facts, p. 79; testimony of Fred S. Fogg, pp. 127, 128; testimony Horace Fogg, pp. 134, 135; testimony Franklin Fogg, pp. 137, 138; testimony C. E. McFarland, p. 142; testimony A. L. Swanson, p. 142.) It is a curious principle of law which permits monopolists whose plans have gone astray, to avoid the obligation of their contracts by pleading their unlawful designs. Particularly is this so when the anticipated plunder would have been theirs alone.

Even though the abstract business be held to deal in commodities within the legal meaning of the word, and the subject matter of a monopoly, was the transaction of 1909 tainted with illegality? In substance, it was the purchase of a competing plant, and a chattel mortgage of the purchased property, to secure the purchase price, enhanced materially by contribution of other property to the security. The purpose of the purchasers to control the business in the community would not render the purchase illegal. The knowledge of the vendors that such was the purpose of their vendees, would not taint it. It did not serve to diminish production be-

cause one abstract plant can serve for the "production" of a supply of abstracts limited only by the number of clerks who can inspect the records; indeed, the 1909 mortgage provided in terms that the plant was to be kept a going concern and every effort made to increase its good will and business. It did not serve to increase prices, for no such intent or purpose existed in the minds of any one connected with the transaction. It is true that for a little while at least (until the Tacoma Abstract Co. came into the field) *price cutting* ceased; but the cutting of prices had been a departure from charges which for many years had been considered by every one just and reasonable, which is a very different thing from compelling an unwilling public to pay an exorbitant charge. The vendors retained no interest in or control of the business. The opinion of the court below lays some stress on the control of the business retained by the vendors; but it is apparent from the mortgage that this control was only a right in the vendors to nominate a competent person, to be employed by the vendees, to attend to the actual entries in the record books necessary to keep the plant up to date. There was no control or participation in the policy or actual business of the vendees. Nor was the transaction complicated by the fact (frequently in evidence in the decided cases) that the purchase took the form of the acquisition of the whole or a controlling interest in the stock of a competitive corporation; but was merely the purchase of the plant of the competitor, leaving the vendor corporation with its franchise and control complete and unimpaired. Nor was there any ancillary agreement of the vendor

corporation or its officers and stockholders not to enter into competition with the vendees. It was merely a sale and mortgage to secure the purchase price of the chattels sold. The opinion of the court below gives much weight to the fact that practically at the same time the property was sold, the plant of another competing concern (the Wilson Abstract & Title Co.) was leased with an option to purchase. But this does not affect the legality or enforceability of the mortgage. It is true that Willoughby assisted in negotiating this lease and was one of the lessees; but the record is clear that he had no actual interest, for he made an entire assignment to the Foggs the day after the lease was made and was indemnified by them against loss by reason of the lease. He had no part or share in either the benefit or burden of the lease. His participation in its negotiation would not render the mortgage invalid or unenforceable. It was no more than a sale of chattels which remotely, temporarily, and very imperfectly affected the "trade" in abstracts. It neither pretended to or could in fact give an exclusive privilege. Our position on these points is well sustained by decided cases of recognized authority:

Davis vs. Booth & Co., 131 Fed. 31.

Booth & Co. vs. Davis et al., 127 Fed 875.

Trenton Potteries Co. vs. Olyphant, 68 N. J. Eq. 507; s. c. 43 Atl. 723; s. c. 46 L. R. A. 255..

Metcalf vs. American School Furniture Co., 122 Fed. 115.

Diamond Match Co. vs. Roeber, 106 N. Y. 473.

Camers-McConnell Co. vs. McConnell, 140 Fed. 412.

Doherty vs. Rice, 186 Fed. 204.

State vs. Continental Tobacco Co., 177 Mo. 1.

Brooklyn Distilling Co. vs. Standard Distilling Co., 120 N. Y. App. Div. 237.

Atty. Gen. vs. Consolidated Gas Co., 124 N. Y. App. Div. 401.

Rafferty vs. Buffalo City Gas Co., 56 N. Y. Supp. 288.

Washington Liquor Co. vs. Shaw, 31 Wash. 398.

Hanover Nat'l Bank vs. First Nat'l Bank, 109 Fed. 431.

Standard Furniture Co. vs. Von Alstine, 22 Wash. 670.

Davis vs. Booth, 131 Fed. 31, is a case akin to the case at bar. The parties were in the business of buying, selling and catching fish—a commodity which is a necessity of life, a distinction drawn by some courts, notably those of England and Massachusetts. Davis was the principal owner of the Davis Fresh & Salt Fish Co., which did business in some sixteen cities in Ohio, Kentucky, Tennessee, Missouri, New York and Michigan. Booth purchased of the Davis Co. its properties and good will by bill of sale and Davis gave personal guarantees thereof. Davis and four others interested in the Davis Co. entered into personal agreements, collateral to the sale, to refrain from competition with the purchaser or his assigns for ten years. Booth made similar purchases and obtained like agreements from many persons engaged in the fish business, and organized a \$5,500,000 corporation to which he made over the prop-

erties purchased and assigned the contracts. Davis and others having breached the agreements, Booth's assignee brought suit to restrain them. The defenses were: (a) The transaction was in restraint of trade within the meaning of the Sherman Act. (b) The transaction was within the prohibition of the Michigan statute relating to freedom of competition and trade. (c) The transaction was illegal at common law as an unreasonable restraint of trade. The trial court found no merit in these defenses, citing particularly the then recently decided case of *United States vs. Addyston Pipe & Steel Co.* (cited by counsel and the court below as a controlling authority in this case) in which Judge Taft, after reviewing the decided cases which hold the several contracts in one form and another tainted with illegality, says: "In the foregoing cases the only consideration of the agreement restraining trade of one party was the agreement of the other to the same effect, *and there was no relation of partnership, vendor and vendee, or of employer and employee.* Where such relation exists between the parties, as already stated, restraints are usually enforceable if commensurate only with the reasonable protection of the covenantee in respect to the main transaction affected by the contract. But in recent years even the fact that the contract is one for the sale of property or of business and good will * * * has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business * * * with a view to establishing a monopoly. * * * *The actual intent to monopolize must appear. It is not enough that the mere*

tendency of the provisions of the contract should be to restrain competition. In such cases, the restraint of competition becomes the main purpose of the contract and the transfer of property and good will * * * is merely ancillary to that purpose.” 85 Fed. 271.

The court below having granted an injunction, Davis appealed. The appellate court sustained the court below and in the opinion Judge Severens says: “We think there is nothing in the anti-trust act which rendered unlawful the purchase by William Vernon Booth and his transfer to A. Booth & Co. of the plant of the Davis Fresh & Salt Fish Co., or which necessarily rendered invalid the agreement of the stockholders of the latter company, which was ancillary to the contract of sale. Nor can this conclusion be affected by the fact that A. Booth & Co. also purchased other plants and stocks to an extent that tended to create a power to monopolize the fish market. There is a clear distinction, which seems to be lost sight of in the argument here between the aggregation of properties by purchase, when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner’s interest is continued in the combination. * * * It may be that the practice of acquiring by a single corporation through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the law making power,

since the old law against forestalling the market has become obsolete." Referring to the defense under the Michigan statute the opinion says: "We think that the intent which made the contract or combination unlawful was one in which both parties participated, and that act was not intended to comprise a case where there was a sale and purchase of property, after which the seller should have no interest in the property, and therefore would have no intent as to its further use." The case went to the Supreme Court on certiorari where the writ was dismissed on a memorandum order. 195 U. S. 636. This case has been cited frequently; but in no case has the doctrine which we have quoted been questioned.

Trenton Potteries Co. vs. Oliphant, 58 N. J. Eq. 507, is an illuminating case which discusses principles involved here and applies them to facts and circumstances much more extreme than the case at bar. There seven managers of seven manufacturers of sanitary pottery, comprising all in the United States, excepting one or two minor concerns, entered into an association for the purpose of fixing the prices of their wares in the United States, such prices to be determined by the majority of the seven members. Afterward, an individual purchased the business, plants and good will of five of the members of the association by separate and substantially contemporaneous and similar contracts of purchase and obtained therewith the individual agreements of the vendors not to re-enter the business for a term of fifty years within the United States, except the State of Nevada and the Territory of Arizona, in which excepted districts it appeared that it was impracticable

to conduct the business. The purchased properties passed to the Trenton Potteries Co., a corporation having a life of fifty years. It was held that the contracts of purchase were valid and enforceable. We quote from the opinion: "A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his business was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition; at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property and its use when so acquired, courts could impose no limitations. They would be compelled to enforce such contracts notwithstanding the effect was to diminish or even exclude competition. * * * It follows that a corporation empowered to carry on a particular business may lawfully purchase the plants and business of competitors, although such purchase may diminish, and, for a time at least, destroy competition. Contracts for such purposes cannot be refused enforcement." This case was tried before an able court, by eminent counsel, has been annotated and cited frequently and discussed by leading text writers. The soundness of the fundamental principles quoted has been generally approved. It has been criticised as springing from the tribunal of a state which is the "Mother of Trusts" and in jurisdictions

where express legislation has been enacted, it has not been followed; but Washington has no such legislation. It has been held to be opposed to the rules announced by Judge Taft in the Addystone Pipe case, but such holding is not sound. Briefly stated, the Trenton Potteries case holds that, unless restricted by legislation, one may purchase the business of his competitors, to any extent that his financial resources will permit, even though his purpose and the necessary result is to diminish or destroy the competition of his vendees. The Addyston Pipe case, discussing the general proposition, which was not necessary to the determination of the particular question presented therein, states the rule to be that such purchases will as a rule be upheld and enforced unless there is an unlawful purpose, in which both vendor and vendee join, to extinguish competition and create a monopoly *the fruits of which both vendor and vendee will enjoy*. These doctrines are not in conflict. Both declare the fundamental transactions legitimate; one declares that legitimate means may not be used to gain an illegitimate end. Both agree upon the one proposition which is pertinent to the case at bar: A vendor's sale is not illegal merely because it tends to or in fact does restrain competition. Both cases, therefore, sustain our contentions.

Metcalf vs. American School Furniture Co., 122 Fed. 115, was a stockholder's suit to set aside a sale of all the assets of defendant for a small cash consideration and stock in the American company because the purpose was to create a monopoly and to restrain competition. The court held the sale valid and enforceable, say-

ing: "Assuming the American Company to have been organized for the express purpose of controlling the sale, price and manufacture of school furniture in the United States, and that the directors of the Buffalo company aided in the general undertaking to incorporate such company and to acquire by purchase the good will and assets of other concerns engaged in similar industries, will the sale by the president and secretary of the Buffalo company, pursuant to a vote of ratification by a majority of the stockholders, be valid? I am unable to find express authority holding such a sale to be invalid."

Diamond Match Co. vs. Roeber, 106 N. Y. 473, was a suit to restrain defendant from breaching an agreement not to invade the good will of a business sold by him. The defense was that the agreement was in restraint of competition and unenforceable. Judge Andrews stated the rule: "We are not aware of any rule of law which makes the motive of a covenantor the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition; and the validity of the contract (not to enter into competition), if supported by a consideration, will depend upon its reasonableness as between the parties."

Camors-McConnell Co. vs. McConnell, 140 Fed. 412, was also a suit to restrain a vendor who had agreed to protect the good will of the business sold. The defense was restraint of trade and monopoly. The court states the rule: "The sale and transfer by a person of

his property and good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade."

Doherty vs. Rice, 186 Fed. 204, was a case which arose in the Fifth circuit. Defendant owned and agreed to sell to plaintiff eight hundred shares of a power and lighting company and agreed further to procure plaintiff the sale of the remaining two hundred shares. Plaintiff owned and controlled a competing company. In a suit to compel performance, defendant pleaded that the contract was void and unenforceable as tending to create a monopoly. The trial court, conceding that such was the purpose and intent, declared the agreements legal and decreed specific performance. On appeal this ruling was upheld (see 184 Fed. 878). It will be noted that defendant not only agreed to sell his own stock, but agreed to procure the sale of stock owned by others, thus participating in the transaction fully as much as did Willoughby in the case at bar.

State vs. Continental Tobacco Co., 177 Mo. 1, was a *quo warranto* to oust defendant under the Missouri statute which forbids a corporation to create or enter into any agreement to control prices, etc. Defendant had bought the business of a competitor and closed down its factory. Held, that defendant's acts were lawful both at common law and under the statute.

Brooklyn Distilling Co. vs. Standard Distilling & Distributing Co., 120 N. Y. App. Div. 237, was a suit

for rent. The defense was that the lease was made in furtherance of a scheme to eliminate competition and to form a monopoly. Held, that landlord could recover, as there was no participation in the unlawful purpose beyond taking the rent money.

Attorney General vs. Consolidated Gas Co., 124 N. Y. App. Div. 401, was a *quo warranto* to oust defendant corporation under the New York statute. Six companies had consolidated and then acquired the whole or a control of the stock of competing companies. It was held that, although the purpose was to prevent competition, the acts of defendant were lawful, since, under the circumstances of the case (the legislature having the power to control prices, and the field being open for other similar enterprises), no exclusive right was obtained.

Rafferty vs. Buffalo City Gas Co., 56 N. Y. Supp. 288, holds that an exclusive privilege or right is indispensable to the existence of a monopoly; that a contract by a gas company to issue its stock in exchange for the stock of a competing company to prevent ruinous competition is not a combination to create a monopoly, inasmuch as no exclusive privilege or right as against individuals or other corporations to manufacture and sell gas is acquired.

Washington Liquor Co. vs. Shaw, 31 Wash. 398, was an action to recover for goods sold. The defense was that plaintiff knew the goods were to be used for an unlawful purpose. The court held such knowledge did not preclude a recovery.

Hanover National Bank vs. First National Bank, 109 Fed. 431, holds that a contract in the consideration and performance of which nothing illegal or against public policy inheres, may be enforced, though it may incidentally aid one in violating a law. One who has received the benefit of such a contract cannot successfully defend on the ground that he intended to or was enabled thereby to do some illegal act which was neither a part of the consideration or of the performance of the agreement; nor would mere knowledge of the other party of such intent or purpose operate to change the rule.

Standard Furniture Co. vs. Van Alstine, 22 Wash. 670, was a case where plaintiff had made a contract of conditional sale of furniture with two women, who to the knowledge of plaintiff were engaged in and intended to use the property purchased for an illegal and immoral purpose. In an action in the nature of replevin to recover the property the court held that the action was properly dismissed, because the title to the property remained in the plaintiff—the purchasers having a mere right of possession. In the opinion Judge Fullerton states the law:

“It is true that it is held in many well considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of a vendor of goods that the vendee designs to and will put them to an immoral or illegal use, is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention, the transaction was one

in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and creditor merely, *or that of debtor and creditor with a mortgage over to secure the deferred payments of the purchase price.* The sale and delivery of the property was complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor.

* * * Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale the law is different.” * * *

THE SECOND ASSIGNMENT OF ERROR.

We have discussed with some prolixity our reasons for asserting that the agreements of 1909 were valid and enforceable and for assigning as error the holding otherwise of the court below. If we have been prolix it is because we feel that the underlying principles apply as well to other matters in which we believe the court below erred. We admit that if the court below was not in error as to the transactions of 1909, there is no reversible error in the record.

What was there in the transactions of 1911 to render invalid and unenforceable the valid and enforceable obligations of 1909? This was the situation. The Title Insurance & Investment Co. of Tacoma owed \$80,000 to the Traders Trust Co. of Oregon as assignee of the Title Insurance & Investment Co. of Washington, secured by mortgage. It was unable to pay, and default would lead to foreclosure. The Title Insurance & Investment Co. was really the Fogg and Gove. The Traders Trust Co. was really Willoughby and Smith. Gove was the ostensible manager of the Title Insurance & Investment Co. Horace Fogg was the president of the Commonwealth Title Trust whose stockholders were identical with the stockholders of the Title Insurance & Investment Co. Horace Fogg took up with Willoughby the matter of a readjustment of the Title Insurance & Investment Co.'s indebtedness. It is somewhat significant that the president of the Commonwealth Title Trust Co. should undertake these negotiations if the separate corporate interests were so material and significant as the testimony of the individual defendants

would lead the court to believe. The Foggs could not pay and did not want to be foreclosed. Willoughby and Smith wanted their money as agreed or the security foreclosed; or new terms of payment with improved security. Gove, the ostensible manager of the corporation which owed the debt, took little or no part in the negotiations. The Foggs on the one side and Willoughby and Smith on the other, threshed the matter out. All seem to have been good traders and competent to protect their several interests. Both had the advice of eminent counsel; neither had any purpose to do anything unlawful or unfair. The final adjustment was:

(a) Willoughby and Smith surrendered the \$80,000 in notes running for eight years and bearing interest at seven per cent, and accepted in lieu thereof notes for \$80,000 running for thirty-two years at five per cent.

(b) Willoughby and Smith satisfied the chattel mortgage which obligated the mortgagor to keep the plant a going concern and up to date in every particular—a security which under the terms of the mortgage was increasing in value year by year and would have cost to keep up to date, as the evidence shows, not less than \$35,000 when the mortgage matured. Thus they surrendered a security which was of continually increasing value for a debt which was materially decreasing in amount year by year. They took in lieu thereof an agreement of pledge of the property, releasing the obligation to keep the business a going concern, and conditionally releasing the obligation to keep it up to date. Thus they accepted a security of continuing decreasing value year by year for a debt which decreased but slowly.

(c) To replace in part their impaired security, Willoughby and Smith accepted the guaranty of the Commonwealth Title Trust Co. of so much of the principal and interest as matured up to 1921; and the agreement of the company to supply the material necessary to make the plant up to date in case these payments were defaulted. To secure the performance of the Commonwealth's guarantee and agreement, they took a mortgage on some of its property. As a further protection, they took the personal warranty of the Foggs and Gove that the Commonwealth's guaranty and agreement was a valid and subsisting obligation of that company.

(d) The Title Insurance & Investment Co. of Tacoma received its notes and the cancellation of its mortgage. It gave the new notes and executed the contract of pledge. There can be no question that it received a full, valid and very valuable consideration for its agreements. It owned the property which was pledged. It was burdened by no public duty relating to the same and could operate it or not operate it as its interests might dictate. It desired to be released from the burden and expense of its operation, imposed upon it by a private contract, and preferred to put it in pledge. It had a full and lawful right so to do. In legal contemplation, the transaction differed in no way from that of a workman who puts his tools in pledge to a pawn broker over a Saturday night. Standing alone, it would require a nimble legal wit to find a pretense to attack its validity. The temperature of a "cold storage" to which the individual defendants refer so per-

sistently in their testimony is no lower than the frozen face and surroundings of the average pawn broker.

(e) The Commonwealth Title Trust Co. had in peril of foreclosure the property it had contributed to the security of the mortgage of 1909. Its stockholders bore the burden of the expense of keeping and feeding two outfits to do the work of one. The earnings of the abstract business were sadly burdened by the outgo for principal and interest, and only a sum thus depleted was available to the Foggs and Gove either for salaries or dividends. They wanted this drain stopped so that salaries should once again flow freely. They owned the Title Insurance & Investment Company. They owned the Commonwealth Abstract Co. Relief for one was relief for the other and all for the Foggs and Gove. They were willing to pledge both for relief. They got it. They do not want to pay for it. That is about all there is to it. A court of conscience should not be quick to aid them. Their ground of defense leads us to

THE THIRD ASSIGNMENT OF ERROR.

Neither the sale and mortgage of 1909 nor the several contracts of 1911 contain any reference to an understanding that Smith and Willoughby were to keep out of the abstract business in Pierce county during the life of the contracts. However, it is but fair to say that such was the general understanding, although there was no specific agreement to that effect, oral or in writing. By a letter bearing date of Dec. 2nd, 1911, but which it is admitted was not written or delivered until the other writings were signed and delivered, Willoughby and Smith agreed so to do, and they have kept their agreement to its spirit and letter. The Fogs testify, however, that such an agreement was discussed and agreed to in the negotiations which preceded the agreements of 1911 and was omitted from the more formal papers by an oversight which was supplied by the letter in evidence. It is admitted, however, that there was no such omission by any oversight in 1909 (although the Wilson lease contained a specific clause covering the subject matter. See Record, p. 107, par. 5). It is somewhat difficult to perceive what change in conditions required that such an agreement became a material matter in 1911, running through all the negotiations, as the individual defendants testify. Willoughby and Smith testify that nothing was said on this subject until after the main contracts were signed and delivered. Their counsel, Elmer M. Hayden, testifies that he never heard of it during the negotiations, and did not know such a writing existed until a short time before he testified at the trial. The letter itself recites: "In consideration of the agreements which *have been* this day made," etc., which shows that

in the mind of the writer these agreements had been already made. Willoughby testifies that after all the agreements had been reached and the writings signed, he had a conversation with one of the Foggs in which he said that he had no intent or purpose to re-enter the abstract business in Pierce County and would not do so; nor did he believe that Smith would do so; but that in a sale of a business in Portland in which Smith was interested, he had agreed to keep out of the business and had afterward broken his agreement, which led to a lawsuit. Thereupon Fogg stated that he would trust Willoughby but would not trust Smith, and requested Willoughby to get an agreement in writing from Smith which Willoughby did and delivered it some time after the other matters were closed. We believe the weight of the evidence sustains Willoughby, particularly as none of the defendants have any memory of the matter except in the most general way, and the specific conversation with Willoughby was not denied, and the surrounding circumstances serve to corroborate him. However, the question is unimportant except as it affects the general weight to be given to defendants' testimony on other and more material matters—notably the character and manner of conducting the abstract business. We do not want to be understood as charging any of the defendants with want of frankness or fairness beyond the natural bias of an interested party to see things in his own way, particularly where his case is weak.

If the agreement was subsequent and separate it is of course without consideration and void; but its invalidity would not taint the principal agreements.

If the contract was ancillary to the principal agreements and was supported by a valid consideration, the protection was no broader than that which was reasonably necessary to the covenantees. It was limited in terms to Pierce County. It ran no longer than the principal agreement. It was reasonable, and did not injuriously affect any public interest.

In the consideration of these questions it is well to bear in mind the distinction between contracts in restraint of trade and contracts in restraint of competition; otherwise, confusion arises and cases appear to be contradictory which are not so in fact. In *Fisher Flouring Mills vs. Swanson*, 76 Wash. 649, Judge Ellis makes this clear: "The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question much confusion may be avoided by marking the distinction, not always observed in the adjudicated cases, between those contracts which, since the earliest history of the law on the subject, have been designated as 'contracts in restraint of trade' and those more correctly designated as 'contracts in restraint of competition.' The term 'contracts in restraint of trade' has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance, as to render its use in any other connection confusing."

The principal distinctions are: (a) Contracts in restraint of trade are personal restrictions, and the public is but remotely interested therein. Contracts in restraint of competition are not in the nature of personal

restrictions, and the public interest is the principal question involved. (b) Contracts in restraint of trade may properly relate to the practice of a profession, skilled service, positions of trust and confidence; good will of a business or occupation; and the particular use of a thing bought or sold, either by a vendor or vendee. Contracts in restraint of competition relate only to commodities which are the subject of commerce, barter and sale; or to services which are impressed with a public or quasi-public duty. (c) Contracts in restraint of trade are valid only when they are ancillary to a principal contract usually of sale, partnership or employment. Contracts in restraint of competition are valid or invalid without reference to whether they are principal or ancillary. Reported cases are often misleading unless, as Judge Ellis pointed out, they are read with these distinctions in mind.

The growth of the law on both of these questions makes interesting reading; but, as to contracts in restraint of trade, the interest is historical only since the opinion of the Supreme Court in *Oregon Steam Navigation Co. vs. Winsor* (infra) which rendered further discussion like "taking coals to Newcastle," as Judge Platt of the First Circuit, stated in *National Enameling Co. vs. Haberman* (infra). That case adopted the "rule of reason" as the basis of decision, and has been followed in every jurisdiction where the English language obtains until citation becomes wearisome. The rule is well expressed in 9 *Cyc. (Contracts)* 529 as follows: "A doctrine has been introduced in some of the later cases, both English and American, which may be

called the doctrine of the reasonableness of the restraint. This rejects entirely the fixed rules stated in the last section (rules as to the limit of time and space) and decides each case according to its peculiar circumstances. It makes the validity of the restraint depend upon the question whether it is such as to afford a fair and reasonable protection to the party in favor of whom it is imposed. If it is, it is upheld; but if it goes beyond this and imposes a restraint greater than is necessary for the protection of the party, it is declared void. This doctrine is founded upon the idea that public policy requires that when a man by his skill or by any other means obtains something which he wants to sell, he should be at liberty to sell it in the most advantageous way; and, in order to enable him to do so, it is necessary that he should be able to preclude himself from entering into competition with the purchaser; and therefore the same public policy which enables him to do that should not forbid him from alienating what he wants to alienate, but should permit him to enter into any stipulation, however restrictive it may be, provided such restriction is not unreasonable, having regard to the subject matter of the contract. Hence a stipulation by the vendor of any trade, business or profession, that he will not exercise the same trade or business so as to interfere with the value of the trade, business or thing purchased, is reasonable and valid."

At common law a restriction which was limited by space to that in which the subject matter of the contract was of value, was always valid although unlimited as to time. (See *9 Cyc.*, p. 527.) That particular

rule might fall in a proper case before the rule of reason, but not in the case at bar because the restriction here is co-extensive with the life of the principal contract. It served only to protect from competition during the very life of the principal agreement and within the territory which was restricted by the peculiar nature of the abstract business to the county whose records formed its basis.

A more difficult question is whether under the particular circumstances of this case the contract was ancillary to a contract of sale. It is true that the contract of 1909 was a sale no part of the consideration of which was an agreement by any one to refrain from exercising the business or calling beyond a vague understanding to that effect which could not be the basis of any right or liability in law or in equity. The substance of the agreements of 1911 was a re-arrangement as to the consideration of the sale of 1909, and the security for the payment of the purchase price rather than a new sale. The parties changed the consideration and security, not in amount, but in detail; and a part of this change was the collateral or more properly ancillary agreement not to compete. Probably this construction would have been necessary if the ancillary agreement had been written within the four corners of the principal agreements of 1911; and, taking the testimony of the individual defendants as true, this was a part of the changed consideration which was omitted by mistake. But would the defendants have been heard to assert it, if the letter in writing setting out the agreement were not in existence? The principal agreements were com-

plete in themselves and contained no hint of the ancillary agreement. Their tenor, force and effect could not have been altered, changed or destroyed by an antecedent oral agreement not contained in the writings.

If the construction to which we have referred is not adopted, then clearly the agreement contained in the letter is separable and becomes a nullity. As we have hereinbefore pointed out, the letter itself recites: "In consideration of the agreements which have been this day made between you," etc., etc., which clearly refers to a past completed transaction and does not attempt to recite that the agreement was a part of the consideration of the agreements already concluded. Such a consideration as that recited would not sustain the contract.

Many of the cases which we have already cited sustain the position which we take.

Davis vs. Booth, supra, holds a restriction, covering six states and running for ten years, is reasonable and valid.

Trenton Potteries Co. vs. Olyphant, supra, holds a restriction, covering substantially the entire United States and running for fifty years, is reasonable and valid.

Diamond Match Co. vs. Roeber, supra, holds a restriction, covering substantially all the United States and running for ninety-nine years, is reasonable and valid.

Other authorities are:

Oregon Steam Navigation Co. vs. Winsor, 20 Wall. 64.

National Enamelling Co. vs. Haberman, 120 Fed. 415.

Knapp vs. Jarvis Adams Co., 135 Fed. 1008.

Walker vs. Lawrence, 177 Fed. 363.

American Brake Beam Co. vs. Punge, 141 Fed. 923.

Hall Mfg. Co. vs Western Steel & Iron Works, 227 Fed. 588.

A. B. Dick Co. vs. Fuller, 213 Fed. 98.

Washington Charcrete Co. vs. Campbell, 72 Wash. 566.

Canaday vs. Knox, 43 Wash. 567.

Loutzenhisser vs. Peck, 89 Wash. 435.

Ragsdale vs. Nagle, 106 Cal. 332.

Cleaver vs. Lenhart, 182 Pa. St. 285.

Zanturjian vs. Boornagian, 25 R. I. 151.

24 *Am. & Eng. Ency. of Law*, 841, Sub. Nom.
"Restraint of Trade."

Oregon Steam Navigation Co. vs. Winsor, 20 Wall. 64, went up from this circuit. A steamboat had been sold by California owners with a restriction that the craft should not be employed in California waters for ten years. Three years later the craft was sold with a restriction that she should not be employed in California waters or the Columbia river and its tributaries for ten years from the date of the latter sale; a bond being given

to secure the performance of the restriction. The Supreme Court held the restriction valid. After reviewing the legal history of the doctrine of restraint of trade, the court announces the rule of reasonableness of the agreement as the measure by which its validity is to be determined, and says: "A stipulation by a vendee of any trade, business or establishment that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade, in which he is himself engaged, that it shall not be used within a reasonable region or distance so as not to interfere with said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that the stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand a stipulation is not objectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not

violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertion." It should be noted that three of the ten years within which the California vendor had stipulated that the craft should not be used in California waters had expired. The restriction of ten years as to those waters was obviously unnecessary. The court held that this would not invalidate the agreement, but that the contract was divisible and good for the seven years remaining.

National Enamelling Co. vs. Haberman, 120 Fed. 415, arising in the First Circuit, held that an agreement unlimited as to time and covering the whole United States was unobjectionable under the circumstances of that case.

Knapp vs. Jarvis-Adams Co., 135 Fed. 1008, arose in the Sixth Circuit. Judge Severens held that with respect to territory the restriction might be as broad as the territory within which the business to be protected was likely to go. (Cited in *Wash. Charcrete Co. vs. Campbell*, *infra*.)

Walker vs. Lawrence, 177 Fed. 363, arose in the Fourth Circuit. Judge Brawley held that a restriction which required a vendor to move away from the place where the business was and to reside elsewhere for a term of years was valid under the circumstances of the case.

American Brake Beam Co. vs. Punge, 141 Fed. 923, arose in the Sixth Circuit. Judge Grosscup held that

an agreement of a patentee to remain out of the brake beam business in the United States during the life of the patent should be upheld.

Hall Mfg. Co. vs. Western Steel & Iron Works, 227 Fed. 588, arose in the Seventh Circuit. The holding of the court below was reversed and the rule stated: The validity of a restrictive covenant in a contract of sale of a business and good will is to be tested, not by whether it is limited or unlimited as to time or place, but by determining whether on the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser.

A. B. Dick vs. Fuller, 213 Fed. 98, arose in the Second Circuit and held that a restraint running during the life of a patent, the sale of which was the subject matter of the principal agreement, was valid under the rule that a restraint not longer than is requisite for the necessary protection of the party with whom the contract is made is not illegal.

Washington Charcrete Co. vs. Campbell, 72 Wash. 566, was a sale of a manufacturing business and an agreement of the vendor not to compete for five years either in Oregon or Washington. The court upheld the agreement, stating the rule: "We are satisfied that the general rule, as supported by the great weight of authority, is that, where a vendor sells the good will of a business, *he is bound by any covenant which is reasonably necessary for the success of the business or the preservation and protection of the property which he sells. The limit of time and territory contained in such*

covenant depends for its validity upon the character and extent of the business, as existing at the time of the sale, and reasonably to be anticipated as necessary for the successful conduct of the business in the future." These contracts are Washington contracts, are subject to *lex loci contractus*. The Washington courts adopt the rule of reasonableness as the one rule of decision.

Canaday vs. Knox, 43 Wash. 567, was a suit to recover a penalty for breach of an agreement to refrain from competition. Defense was, no breach and contract void as against public policy. Court below sustained demurrer to evidence. On appeal the Supreme Court reversed the judgment and sent case back for further proceedings. The case came again to the court (48 Wash. 685) where judgment for plaintiff below was sustained, court holding the amount of the penalty could be recovered as liquidated damages.

Loutzenhisser vs. Peck, 89 Wash. 435, was an injunction suit to restrain defendant from violating an agreement not to compete, the agreement being ancillary to a sale. Defense was, the contract was without limitation as to time under the peculiar and inapt wording of agreement. Appellate court held injunction properly granted.

Ragsdale vs. Nagle, 106 Cal. 332, was a suit to restrain vendor, who had been in partnership with vendee, for breach of agreement not to compete on dissolution of partnership and sale of plant and goodwill. The business was an abstract and title searching business in Sonora County. Agreement was that vendor would not

carry on an abstract business in Sonora County as long as vendee should carry on a like business therein. Vendee organized a corporation to which the title of plant, etc., was conveyed; but vendee's purpose was to borrow on the stock of the company as collateral, all of which he owned except a few shares held by accommodation directors. Vendee carried on the business personally, the corporate organization remaining dormant. Held, that agreement was valid and injunction properly granted. This case has been cited and approved in *Gregory vs. Smickes*, 42 P. 577. and the very recent case of *Akers vs. Rappe*, 158 P. 131, where a restriction running twenty years was upheld and approved.

Cleaver vs. Lenhart, 182 Pa. St. 285, was a sale of business under an agreement in writing which contained no restriction. Twenty days later the parties made an agreement in writing which recited that in consideration of the purchase of the business the vendor agreed to refrain from competition. Held, the agreement was without consideration and failed for that reason.

Zanturiian vs. Boornagian, 25 R. I. 151, was a sale of business and goodwill under a bill of sale with an alleged oral agreement not to compete. Also alleged subsequent agreement to make written agreement not to compete. Held, oral evidence to enlarge bill of sale inadmissible to cover matters agreed to but not included therein. Held, further that subsequent agreement was without consideration.

In several states, restraint of trade has been the subject of statutory enactments. California (Civil Code, P. 1673) provides that one selling the goodwill of a business may covenant to refrain from carrying on a

similar business within a specified county so long as the buyer, or any person deriving title to the goodwill, carries on a like business therein. South Dakota has a similar statute. (Rev. Civil Code, P. 1278.)

24 *Am. & Eng. Ency. of Law*, 841 et. seq.; “*Restraint of Trade*.” There is no better or clearer epitomized statement of the controlling principles than is contained in this article. It states that at all times since the leading case of *Mitchell vs. Reynolds*, 1 P. Wms. 181, (A. D. 1711) contracts in restraint of trade which were limited to a county were held valid (p. 843), although not limited in time (p. 847). The court below fell into error in determining the particular point herein presented because the court took as the standard of reason that which appeared to be reasonable to the mind of the court rather than that which the legislation of Washington and other states, the public statutes, and judicial decision had determined and defined as reasonable. That the latter is the true standard is clearly pointed out in *U. S. vs. Trans-Missouri Freight Asso.*, 58 Fed. 58, in dealing with a cognate question: “In considering that subject we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries.”

FOURTH ASSIGNMENT OF ERROR.

The court below held the contracts of 1911 were void and unenforcible as within the inhibition of the Washington Constitution, Art. 12, Sec. 22, as follows:

“Monopolies and trusts shall never be allowed in this state, and no incorporated company * * * in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or trustees or assignees of such stockholders * * * or in any manner whatsoever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section.” * * *

By its terms this provision of the constitution is not self-executing. The Supreme Court of Washington has so held. *Northwestern Warehouse Co. vs. Oregon Ry. & Nav. Co.*, 32 Wash. 218. Washington has no statute which by any stretch of the imagination applies to contracts such as are under consideration here. It has legislated freely in regard to contracts of common carriers and of public service corporations; and has twice enacted statutes upon cognate subjects—once, forbidding commission merchants to combine to regulate the price of farm and garden products (Bal. Rem. Code, Sec. 7032), and again to pass a statute, carefully limited to *associations not formed for profit*, forbidding combinations to fix or regulate the price of commodities (Bal. Rem. Code, Sec. 3762). It is significant, at least, that, having the subject matter twice under consideration, the law-making power of Washington has twice refrained from giving to the constitutional provision any-

thing like the broad and comprehensive scope which the court below gave to it. Indeed, the Washington court gave this fact more than mere significance and held that the court was controlled thereby. After holding the clause to be not self-executing, and referring to legislation thereunder, the court says: "The legislature has therefore construed this section of the constitution as not self-executing and we think its construction the correct one. It follows, therefore, that whatever rights the respondents have in the premises must be determined by the terms of the statute * * * and that *courts may not enlarge upon the statutory provisions, even though the legislature might possibly do so within the terms of the constitutional limitation.*"

But if the section were self-executing, the contracts in suit would not be within its provisions. Monopolies, strictly speaking, can only be created by grant of or through the sovereign power, and operate to withdraw that which was before a common right and vest that right in one or more individuals to the exclusion of all others. (*Charles River Bridge Co. vs. Warren Bridge Co.*, 11 Peters 420.) By loose usage, "monopolies" has come to mean, both in the written and unwritten law, contracts, agreements and combinations in restraint of competition. Giving the word this broader meaning, the contracts in suit would not come within the constitutional inhibition. It is familiar rule that all the parts of a constitutional provision are to be considered together, and that a particular word or a particular phrase is not to be considered apart from the context to control the legislative meaning or broaden the scope of a constitutional

provision. Standing alone, the phrase, "Monopolies and trusts shall never be allowed in this state," has no meaning and affords no rule by which even the most learned and intelligent can determine whether or not a proposed cause of action is legal or illegal. Unless it is defined by other parts of the constitution, it is inoperative until the legislature has given to it a definite meaning. Until that which is indefinite becomes definite and certain, neither public nor private rights attach, nor public nor private duties become operative. To follow the course of the court below is to ignore the very definition of the law; for "law is a rule of human conduct, prescribed by competent political authority, commanding certain things as necessary to and forbidding other certain things as inconsistent with the peace and order of society." If, in legal contemplation, there is no certainty, there is no law.

Cooley: Constitutional Limitations, p. 100: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law."

This principle is adopted as a rule of construction in Washington. The constitution has a provision for taking private lands for private ways of necessity; but when *Long vs. Billings*, 7 Wash. 267, was decided, the legislature had made no provision therefor. In a suit to enforce the right under the constitution, the court in

that case said: "Before any such right can arise the legislature must define private ways of necessity, authorize persons to apply for them and prescribe the method by which the necessary land is to be taken. The constitution gives no higher right than permission to the legislature to take private lands for merely private roads."

But "Monopolies and trusts shall never be allowed in this state," which the court below cut from the general body of the section, and to which it gave controlling importance, does not stand alone. It is joined conjunctively to the remaining parts of the provision which forbid combinations, contractual or otherwise, which *have for their purpose* (a) to fix the price, (b) to limit the production, (c) to regulate the transportation of products and commodities.

The contracts in suit did not have for their purpose and did not in fact fix the price of anything unless it was the purchase price of the plant and business sold. Nor did these contracts limit the production of anything—product, commodity or anything else. There never was, nor in the nature of things could there ever be, any scarcity of abstracts, nor could the abundance of abstracts have any effect, since abstracts are procured for particular tracts, and the certificate thereof obtained for a single transaction. Certainly there was no question of transportation involved.

Nor is the constitutional provision to be broadened to include that which is not set forth therein. It is an equally familiar rule that where a constitutional provision forbids certain things and sets forth in terms the

kind and character of the things forbidden, the maxim, "*Expressio unius est exclusio alterius*," is properly applied; and nothing is forbidden except those things which are within the definition. In construing this particular section the Supreme Court of Washington has so limited its scope. In *Woods vs. Seattle*, 23 Wash. 1, the court says: "The prohibition is directed against combinations between corporations or individuals made 'for the purpose of fixing the price, or limiting the production or regulating the transportation of any product or commodity,' and it is combinations of this character and for these purposes that constitute the monopolies and trusts which the constitution inhibits."

Properly construed, the provision of the constitution means no more than this: The legislature is *directed to determine and define* what contracts, combinations, etc., which *have for their purpose* (a) fixing the price, (b) limiting the production, (c) regulating the transportation of products and commodities, are *in the judgment of the legislature* monopolistic and in restraint of competition; and to forbid such contracts, etc., under penalties. The legislature has exercised its judgment and discretion and has never yet and never will brand as illegal contracts such as are here in suit. There remains no field within which a court may determine other contracts are within the constitutional inhibition.

The construction of its constitution by the Supreme Court of the State of Washington controls the federal courts in all matters except those in which a federal question is involved; for each state of the union has the right to construe its own constitution and its own

laws, and its construction is final and binding. *Fairfield vs. Gallatin County*, 100 U. S. 47; s. c. 25 Law Ed. 544. If these contracts are illegal, they are tainted by some provision of common law, and not by force of any constitutional or statutory enactment. At common law contracts and combinations which effectually gave to a few the control of a trade in commodities, to an equally effective exclusion of the many, were illegal, not because of inherent taint in the subject matter or want of capacity in the parties, but on the broad ground of public policy, which regarded contracts and combinations in restraint of competition as a misuse, to the public injury, of the right of freedom of contract. The growth of the law on this question has followed an almost exact parallel with the development of the law of restraints of trade, which originally condemned all restraint of individual activity within the trade, then relaxed the rule by adopting more or less arbitrary distinctions of time and place, and finally discarded all such arbitrary rules for the "rule of reasonableness" as the one principle of decision. So in contracts in restraint of competition, some of the earlier decisions condemned even that which tended merely to relax competition; later more or less elastic standards of the *extent* of the control of supply and of prices were adopted, which differed greatly in different jurisdictions; but to-day the strong tendency, if not the accomplished result, is to abandon these unsatisfactory standards for the "rule of reason," which takes into consideration the circumstances of each particular case and decides it in ac-

cord with the public policy which obtains within each jurisdiction. (*Noyes: Intercorporate Relations*, Par. 337.) While this rule leads to more or less conflict of decision this conflict is more apparent than real, for it is the public policy of each jurisdiction which declares what is a reasonable restraint and what is not. In some states the competitive principle is regarded as sacred, sweeping statutes to protect it have been enacted, and courts have been quick to condemn anything which affords an opportunity or merely tends to invade it. In other states freedom to contract and the inviolability of contracts when made are regarded as much a matter of sound public policy as the principle of competition, and contracts will not be condemned unless it affirmatively appears that the public will inevitably and necessarily be harmed by their enforcement.

In the case at bar these are Washington contracts and are to be measured by the law and public policy of this state. The public policy of Washington is not to be determined by the economic, political or personal opinions of the individual who sits as judge to hear the cause but by the constitutional provisions, statutory enactments and judicial decisions of the jurisdiction where the contracts were made and within which they were to be performed. We have shown clearly that the constitution of Washington contains nothing, express or implied, to taint these contracts. It is equally clear that although the legislature has twice considered the subject matter, there is no legislation which brings these contracts within its scope. The decisions of the Washington courts contain nothing which brands these con-

tracts as illegal. We have shown that as to contracts in restraint of trade, the rule of reason is the controlling principle of decision. The same rule of reason has been adopted as to contracts in restraint of competition. In *Fisher Flouring Mills Co. vs. Swanson*, 76 Wash. 649, the plaintiff manufactured a brand of patent flour and sold it to defendant on condition that he maintain plaintiff's fixed minimum retail prices. For a breach of the condition suit was brought to which defendant's demurrer was sustained by the trial court. On appeal the court below was reversed. After a careful consideration of all of the features of the case the rule is substantially stated as follows: Contracts incidental to some main contract, not proceeding from or tending to create and maintain a monopoly, will be maintained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties and of the public. It may be noted that neither the court nor the parties considered this case as within any constitutional provision or statutory enactment of Washington, but it was presented, considered and decided under common law principles.

Measuring these Washington contracts in the case at bar by Washington law, it seems absurd to find them illegal, and equally absurd to refuse to enforce them.

The citation of decisions in other jurisdictions is unnecessary and may lead to confusion. We have called to the attention of the court many cases which bear upon the question and there are many others which support the rule adopted in Washington. In discussing the questions raised by the first assignment of error we have

cited several cases which bear directly upon the question now under consideration. We refer the court particularly to:

Trenton Potteries Co. vs. Olyphant;

Davis vs. Booth & Co.;

Metcalf vs. American School Furniture Co.;

Diamond Match Co. vs. Roeber;

Camors-McConnell Co. vs. McConnell;

Other cases which support our contentions are:

Cincinnati Packing Co. vs. Bay, 200 U. S. 179
s. c. 50 Law Ed. 428.

Oakdale Mfg. Co. vs. Garst, 28 Atl. (R. I.) 973.

Hubbard vs. Miller, 27 Mich. 15, s. c. 15 Am.
Rep. 153.

Mutual Life Ins. Co. vs. Durden, 72 S. E. 297
(Georgia).

Stromer vs. Van Orsdel, 103 N. W. (Neb.) 1053.

Sweigert & Howard vs. Tilden, 21 Iowa 650.

Central Shade Roller Co. vs. Cushman, 143 Mass.
353, s. c. 9 N. E. 629.

Printing Co. vs. Sampson, L. R. 19 Eq. 462.

Cincinnati Packing Co. vs. Bay et al, 200 U. S. 179, was a sale by Bay of certain craft employed on the Ohio river on deferred payments, coupled with agreements that the purchaser should not be required to pay the installments if competition developed which cut prices as long as such competition continued; and agreements of the vendors not to enter into competition; and an agreement of vendees to maintain the established rates.

The Ohio courts found the agreements valid but certified to the Federal Supreme Court the question whether or not the restrictions were within the Sherman act as restraints of interstate commerce. This question the Supreme Court decided in the negative; but in the opinion states principles of value here. Asserting that the court will not assume facts to render a contract illegal, the court, through Mr. Justice Holmes, says: "A contract cannot be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts * * * We will suppose then that the contract does not leave commerce among the states untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. * * * The chief and visible object of its provisions has nothing to do with commerce among the states. That which suspends payment of installments in case of serious opposition is security against a losing bargain, not a combination to gain a monopoly." Speaking of the agreement of the vendees to refrain from competition, the opinion says: "The price was paid not for the vessels alone but for the vessels with the covenant. * * * Presumably all there was to sell, besides certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names. This being our view of the covenant in question * * * we believe that such a contract, made as a part of the sale of a business, and not a device to control commerce, would not fall within the act. On the contrary, it has

been suggested repeatedly that such a contract is not within the letter or spirit of the statute. (Citing cases.) It would accomplish no public purpose but would simply provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller, necessary in order to give the sale effect, were to be declared illegal in every case where a nice scrutiny could discover that the covenant might possibly reach beyond the state line. * * * It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases." Here the respondents ask this court to follow the court below into a mere suspicion that the contracts in suit had for a dominant purpose the creation of a monopoly. They ask your Honors to import a strained meaning to the constitutional provision, and to exercise a nice scrutiny and judicial astuteness, not to uphold honest contracts and obligations, but to avoid them. We think that the acumen of this court should, if necessary, be employed to bring about an opposite result. One thing is at least clear from the opinion we

have cited. The purchase of a competitor's *competition* is a valid transaction when ancillary to a sale.

Oakdale Mfg. Co. vs. Garst, 28 Atl. (R. I.) 973, was an agreement among four manufacturers to consolidate in one corporation, which was attacked as in restraint of competition. The court held the agreement valid and said: "It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is illegal. Such a rule would produce a greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public." This excerpt from the opinion seems to cover the case at bar. Granting, for the argument, that the number of competitors was diminished, it was a sale between those engaged in a common business. It secured economy of administration. It was beneficial to the parties and not injurious to the public. It was in accord with the familiar course of business. There was no *purpose or intent* to accomplish an illegal end, which the Supreme Court of the United States in *Swift vs. U. S.*, 196 U. S. 375, held to be of the very essence of the question, saying: "Intent is almost essential to such a combination (i. e., in restraint of commerce). Where acts

are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.” Indeed the court will note that the constitutional provision in question makes the *purpose* of the agreement the controlling matter.

Hubbard vs. Miller, 27 Mich. 15, holds a contract should be upheld which, considered with reference to the situation, business and object of the parties and in the light of all the surrounding circumstances, appears to be made for a just and honest purpose and for the protection of legitimate interest, and is reasonable as between the parties even though it serves to restrict competition, if such restriction is not specially injurious to the public.

Mutual Life Insurance Co. vs. Durden, 72 S. E. (Ga.) 297. holds it well settled that courts will not void contracts on the ground of public policy except where the case is free from doubt and the injury to the public clearly appears.

Stromer vs. Van Orsdel, 103 N. W. (Neb.) 1053, holds that the enforcement of lawful contracts is a sound public policy of equal importance to the rule which forbids the enforcement of immoral or illegal agreements and that a contract should never be condemned on suspicion, but that its invalidity must appear clearly and without doubt.

Swigert vs. Tilden, 21 Iowa 650, uses this strong argument which applies with force to one aspect of the

case at bar and appeals persuasively to a court of good conscience and fair dealing: "To any one at all familiar with present day conditions it requires no argument to demonstrate that public policy requires that in trade matters there shall be no restraints imposed, save in those instances where it is clearly made to appear that the public welfare would be otherwise seriously endangered. And an all-important factor in business life is the right of individual contract—the right to buy and sell, to bargain and convey at will. The demand for recognition of this, coming up from the world of business, has been heard and countenance given thereto by legislatures and courts everywhere. So, too, note has been taken of the baneful results which follow seemingly with inevitable certainty, from giving sanction even negatively to acts or conduct involving fraud or dominated by bad faith. And certainly it is not going too far to say that there can be no sound public policy which operates to give countenance to the open disregard and violation of personal contracts entered into in good faith and upon good consideration. A recent expression of the English court of appeals on the subject rings true. In *Underwood vs. Barber*, 68 L. J. Ch. Div. 201, it is said: 'If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into; and to allow a person of mature age and not imposed upon to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is *prima facie*, at all events, contrary to the interests of any and every

country.' It has thus come to be the rule of the cases in most jurisdictions that a contract in itself reasonable and based upon a good consideration will be enforced according to the rights of the respective parties thereto, and this notwithstanding it may appear that in some respects or in a limited way the enforcement of such contract has for a result a partial restraint of trade."

Central Shade Roller Co. vs. Cushman, 143 Mass. 353, holds that even though the purpose of an agreement is to regulate competition between the parties, the purpose is lawful. It is only the purpose to impose a burden upon the public which is unlawful; and unless such purpose, coupled with power to carry it into effect, appears clearly, the agreement is valid and courts should enforce it. To hold otherwise would be to impair the right of persons to contract and to put a price upon the products of their own industry.

Printing Co. vs. Sampson, L. R. 19 Eq. 462, states the principle in a form which has been cited frequently (see *9 Cyc.*, 482-483, note): "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing more than another public policy requires it is that men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

It is true that in some jurisdictions, the competitive principle has become a fetich, and sweeping legislation has been enacted to protect it. A mere scent of restraint has set the judicial nostrils a-quiver and judicial condemnation has followed upon political and economic rather than on legal ground. But this fetich has feet of clay which are crumbling rapidly and we are beginning to see that uncontrolled competition is at least as great a public evil as uncontrolled restraint. The principles of law have never followed the popular opinion, but even in the most extreme cases nothing can be found to condemn such contracts as these at bar. We submit that the true rule is stated by the cases we have cited and by leading text writers as follows:

Elliot, Contracts, Vol. 3, Sec. 650: "The law's broad, general statements (as to invalidity of agreements contrary to public policy) are of little value when applied to a concrete case. It must be borne in mind that the public interest is not well served by indulging baseless suspicion of wrong-doing. Public policy forbids the enforcement of any illegal or immoral contract, but it is equally insistent that those which are lawful and contravene none of its rules be duly enforced and not set aside or held invalid on a bare suspicion of illegality. The courts will not declare a contract void on the ground of public policy unless it equally appears that the contract is in violation of the public policy of the State. The doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on this ground unless its contravention of public policy is clear and is manifestly injurious to the in-

terest of the State. Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract is against public policy."

Joyce, Monopolies, Sec. 94: "It has been clearly recognized in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade. * * * Where the business is open to all others, there is little danger that the public will suffer harm from lack of persons to engage in profitable industry. Such contracts do not create monopolies. They confer no special and exclusive privileges."

FIFTH ASSIGNMENT OF ERROR.

This assignment raises the question whether or not the agreements of the Commonwealth Title & Trust Co. were forbidden by the terms of Art. 12, Sec. 6 of the Constitution of Washington, which is as follows:

Limitations Upon Issuance of Stock.—Corporations shall not issue stock except to *bona fide* subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money except for money or property received or labor done * * *

The court below held the agreements of the Commonwealth Title Trust Company were within the inhibition of that clause of the constitutional provision which reads: "Nor shall any corporation issue any bond or other obligation for the payment of money except for money or property received or labor done." The court will recall that in 1909 the entire stock of the Commonwealth Company was owned by the Foggs and Gove; that they, through Franklin Fogg, negotiated the purchase of the plant and goodwill of the Title Insurance and Investment Company of Washington; that, for purposes of their own convenience, they caused to be organized the Title Insurance and Investment Company of Tacoma to take title to the property purchased, and contributed to the security for the payment of the purchase price property of very considerable value which belonged to the Commonwealth Company; that the capital stock of the new company was but \$5,000, but the purchasers raised the \$10,000 for the initial payment, probably from the resources of the Commonwealth Com-

pany, and, after the purchase practically ignored the new corporate organization and ran the business of both companies as a common enterprise. Frankly, we think it may fairly be inferred from all the circumstances that the convenient purposes of the purchasers in causing the organization of the new company were as follows: (a) To limit the legal liability for the unpaid part of the purchase price to the assets of the new corporation, which consisted of the purchased property and the property contributed to the security by the Commonwealth Company. (b) To secure and protect the goodwill of the business by having it under a name substantially like that of its predecessor. (c) To prevent price cutting and perhaps deter others from coming into the field by the apparent presence of two companies equipped and ready to meet the demand for abstracts. None of these purposes were illegal; all were proper and even laudable; but respondents here now seek to draw about them the mere fiction of a corporate entity as a cloak of protection against the cold wind of contractual obligation.

The court will recall further that in 1911 the abstract business in Pierce County was not prosperous; a new and vigorous company was in the field; business generally was dull; heavy payments were coming due, and the purchasers were sustaining two outfits to do a business which either one could more than do. Again the Commonwealth Company, this time through Horace Fogg, its president, took up negotiations to meet the new situation. They wanted to be relieved of the necessity of keeping up two plants. They wanted to cut down the interest rate. They wanted to extend the

time and method of payment. They got all these things and gave in return an obligation of the Commonwealth Company to guarantee part of the payments. This obligation they now assert was forbidden by the organic law of the State. We do not believe their assertion is sound in law, in equity or in morals.

In no reported case has an attempt been made to apply this or any similar constitutional provision to restrict the power of a corporation to enter into contractual relations by which it obligates itself to pay a debt. If we read the constitutional provision in the light of the ordinary and useful canons of construction, we must read it: "nor shall any corporation issue any bond or other such like obligation for the payment of money," etc., which would of necessity exclude from its operation a contractual corporate obligation of the kind of the case at bar. This reading is sustained by the general text and purpose of the provision, which in terms provides for protection of the investing public against fictitious securities rather than a limitation upon the contractual powers of a corporation. The reason and object is to assure the public, which invests in corporate stocks or bonds, that the corporation has received money's worth for its obligation. It is intended as a protection to the public, and is in no sense a shield by which a corporation may avoid its contractual obligations entered into in the ordinary business of the corporation. It is restricted in its operation to those securities which pass by delivery or endorsement under the law merchant. It is not intended nor can it be held to apply to

a contractual obligation which is not negotiable by endorsement or delivery.

Among the aids to a true construction of the constitutional provision are: A contemplation of the object to be accomplished or the mischief designed to be guarded against. *Cooley: Constitutional Limitations*, 5th Ed. p.79. And the object and purpose of the provision may be gathered from its title and from the context. *Knowlton vs. Moore*, 178 U. S. 41. And its scope and terms may be ascertained by the *ejusdem generis* rule. *Directors of Kittitas Irrig. District vs. Peterson*, 4 Wash. 147; *Vassey vs. Spake*, 65 S. E. 826. Applying these rules it is clear that the clause in question does not include the contracts at bar.

Memphis etc. Ry. vs. Dow, 120 U. S. 287; s. c. 30 Law Ed. 595.

Continental Trust Co. vs. Toledo Ry. Co., 83 Fed. 642.

Coe vs. East etc. Ry., 52 Fed. 531.

Mackintosh vs. Flint etc. Ry., 34 Fed. 583.

Brown vs. Duluth etc. Ry., 53 Fed. 889.

Atlantic Trust Co. vs. Woodbridge, 79 Fed. 842.

Sioux City etc. Ry. vs. Manhattan Trust Co., 92 Fed. 428.

Krantzenstein vs. Lehman, 44 N. Y. Sup. 269.

Shirk vs. People, 121 Ill. 61.

St. Paul Fire etc. vs. Penman, 151 Fed. 969.

Jewell vs. Nuhn, 138 N. W. (Iowa) 457.

Bank of Willows vs. Glenn County, 101 Pac. (Cal.) 13.

Memphis Railroad Co. vs. Dow, 120 U. S. 287, is a leading case and the only case in which the construction of any similar constitutional provision has reached the Supreme Court. There the question arose under the Arkansas Constitution which provides that no corporation shall issue stock or bonds except for money, labor done, or property actually received. The court considered the provision largely in the light of the objects and purposes to be obtained thereby. We feel strongly that the Washington Constitution must be read in the same light. We therefore quote freely from Mr. Justice Harlan's opinion:

"The prohibition against the issue of stocks or bonds except for money or property actually received or labor done, and against fictitious increase of stock indebtedness, was intended to protect the stockholders against spoliation and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stocks and bonds that do not represent anything whatever of substantial value."

The opinion then cites with approval *Peoria Ry. Co. vs. Thompson*, 103 Ill. 201:

"The object was doubtless to prevent reckless and unscrupulous speculators under the guise or pretense of building a railroad or of accomplishing some other legitimate purpose, from fraudulently issuing or putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stocks or bonds in such cases being entirely fictitious."

Further considering the same matter, Mr. Justice Harlan continues:

“Recurring to the language employed in the Arkansas constitution, we are of the opinion it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear from the words used that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property or labor, upon such terms as they deem proper, provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property rights, and privileges in question, for a given amount of its stock and bonds falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders.”

Continental Trust Co. v. Toledo Ry. Co., 83 Fed. 642, was an opinion by Judge Taft approving a railroad re-organization on the authority of *Memphis vs. Dow*. On appeal Judge Lurton affirmed Judge Taft, referring to *Memphis vs. Dow* as a controlling authority. (See 95 Fed. 497).

Coe vs. East etc. Ry., 52 Fed. 531, construes the provision of the Alabama constitution, citing *Memphis vs. Dow* as a controlling authority.

Mackintosh vs. Flint etc. Ry., 34 Fed. 582, construes a Michigan statute in the light of *Memphis vs. Dow* and cites it as a controlling authority.

Brown vs. Duluth etc. Ry., 53 Fed. 889, puts a similar construction on a Minnesota statute on authority of *Memphis vs. Dow*.

Atlantic Trust Co. vs. Woodbridge etc. Co., 79 Fed. 842, construes the California constitutional provision, citing and relying on *Memphis vs. Dow*.

Sioux City etc. Ry. vs. Manhattan Trust Co., 92 Fed. 428, construes the Nebraska constitutional provision and holds *Memphis vs. Dow* a controlling authority.

Krantzenstein vs. Lehman, 44 N. Y. Supp. 369, was under a statute providing that a levy on personal property such as a bond, promissory note or other instrument for the payment of money, must be by taking the same into actual custody. Held, that the phrase "other instrument for the payment of money" must be interpreted as referring to instruments of similar character to bonds and notes which pass by delivery and would not include an insurance policy.

Shirk vs. People, 121 Ill. 61, was a prosecution under a criminal statute for uttering forged notes, checks, bills, etc., or "other instrument in writing for the payment of money." Held, to include only writings of the class mentioned for the absolute and unconditional payment of money.

St. Paul Fire etc. Co. vs. Penman, 151 Fed. 969, in opinion by Holland, J.: "Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the person or things therein comprised may be read as the same with, and not of a quality superior to, or different from those specifically enumerated."

Jewell vs. Nuhn, 138 N. W. (Iowa) 457. Its articles provided that a Building & Loan Company should have a lien upon the shares of each stockholder for any sum due it "for subscription, money loaned, or any other indebtedness due from the shareholder" held, under the *ejusdem generis* rule, the company had no lien upon the stock of a defaulting officer.

Bank of Willows vs. Glenn County, 101 Pac. (Cal.) 13. Under California constitution, Article 13, paragraph 4, providing that a mortgage, deed of trust, contract, "or other obligation by which a debt is secured" shall, for the purpose of assessment or taxation, be deemed an interest in the property thereby affected, does not, under the *ejusdem generis* rule, include a collateral security on a loan of personalty.

It appears then that the rule is established that these similar constitutional provisions are confined in their operation to fictitious securities which pass by delivery or endorsement in the public markets. The rule is stated by *Clark & Marshall: Private Corporations*, Vol. I, p. 485:

“The prohibition, however, is not to be construed so as to restrict and hamper corporations in the management of their legitimate business or in procuring the means to accomplish their legitimate objects. To bring a case within the prohibition, it must appear that the corporation has fraudulently issued, or is about to fraudulently issue and put upon the market, bonds which do not represent and are not intended to represent money or property received.”

In *Chavell vs. Washington Trust Co.*, 226 Fed. 400, Your Honors had under consideration the constitutional provision in question. You held in that case that a pledge of corporate bonds as additional collateral to secure an antecedent indebtedness was within the constitutional inhibition; but also held that as these securities passed by delivery, such of the bonds as were in the hands of innocent purchasers for value were valid whether valid in the hands of original holders or not. The case arose in bankruptcy and was between the trustee for the creditors and the holders of the securities. It touches no question presented by the case at bar, although it was cited to and relied upon by the court below to sustain its findings.

It is true that the words “or other obligation” are not within many of the constitutional provisions; but it is a strange interpretation which gives to this phrase an effect which puts aside the rule which so generally obtains throughout the land. Three states—Washington, Arizona and Utah—contain this phrase in their constitutional enactments; but in none of them has any attempt been made to give to it any force or meaning beyond

that which the *ejusdem generis* rule would require. (See Arizona Constitution, Art. 14, Sec. 6; Utah Constitution, Art. 12, Sec. 5).

If the constitutional provision is to be broadened to include obligations which do not pass by delivery and endorsement, it must be on the theory that the stockholders of a corporation are to be protected from impairment of the corporate trust fund. Since this would be a provision for their protection alone, the stockholders could waive it, or by a course of conduct could estop themselves from claiming it. Here there is no right of creditor involved. The corporation itself and its stockholders claim the benefit of the provision. The corporation has estopped itself by reciting in its agreement the consideration flowing to it (See record, p. 25, Exhibit B) and by its further recitals in its corporate resolution (See record, p. 58, Exhibit 3). Its stockholders have estopped themselves thrice over; first, by accepting the cancellation of the old mortgage and the surrender of the old series of notes; second, by all joining in the meeting of the Commonwealth Company at which the contract of guaranty and the accompanying mortgage was authorized; third, by all joining in the individual guaranty of the validity, force and effect of the Commonwealth Company's agreements.

Cooley: Constitutional Limitations (5th Ed.),
p. 216.

Mutual Life Ins. Co. vs. Durden, 72 S. E. (Ga.)
297.

Ferguson vs. Landram, 5 Bush. (Ky.) 230.

Reid vs. Field, 82 Va. 26.

30 Cyc. 254, sub. nom "Waiver."

Cooley: *Constitutional Limitations*, p. 216 (5th Ed.) sub. nom. "*Waiving a constitutional objection*: "There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will. * * * And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed by a justice of the peace, and the dam was erected and the damages were assessed as provided by the statute, it was held in an action on the bond to recover those damages, that the party erecting the dam and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common law trial by jury. In these and like cases the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacles and lets the statute in to operate the same as if it had in terms contained the condition."

Mutual Life Insurance Co. vs. Durdan, 72 S. E. 297, (cited *supra* upon another point) was a suit upon an insurance policy. A statute of Georgia provides that an insurer shall not be liable on the policy in case the in-

sured commits suicide. The policy contained a clause that the insured should not be liable in case the insured, sane or insane, committed suicide within a year. The insured had committed suicide, but not within the year. The trial court and the appellate court sustained a recovery on the policy, holding that the statute was for the benefit of the insurer, that its protection could be waived and had been waived by the terms of the policy.

In *Ferguson vs. Landram*, 5 Bush (Ky.) 230, it is held that one who has co-operated with others in securing legislation will be held to have waived any objection he might have raised when he is charged with its burdens.

Reid vs. Field, 82 Va. 26, holds it is a recognized principle of law and equity that one may waive a right guaranteed by law for his protection if his waiver is without detriment to the community at large.

In 40 Cyc. 254 et seq. it is stated that one may by agreement, express or implied, or by a course of conduct, waive a constitutional, statutory or contractual right; and a multitude of cases are cited to sustain these propositions.

Considered in this light the contracts of the Commonwealth Co. were no more than *ultra vires*, and certainly the corporation and those interested in it would be estopped under the facts of the case. The full benefit of the executed contract has been received, and it is not now possible to return to the vendors the goodwill and security of a going concern which five years of inactivity has destroyed.

Omaha Hotel Co. vs. Wade, 7 Otto 13; s. c. 24 Law Ed. 917.

Union Nat'l Bank vs. Matthews, 98 U. S. 621; s. c. 25 Law Ed. 188.

Hitchcock vs. Galveston, 96 U. S. 341; s. c. 24 Law Ed. 659.

U. S. Sav. & Loan Assn. vs. Convent, 133 Fed. 354.

Barr vs. New York Ry. Co., 125 N. Y. 263.

Tootle vs. First Nat'l Bank, 6 Wash. 188.

Allen vs. Olympia Light etc. Co., 13 Wash. 307.

Spokane vs. Amsterdamsch etc., 22 Wash. 172.

Omaha Hotel Co. vs. Wade, 7 Otto 13, was a case where stockholders had authorized a loan by directors which was both unlawful and onerous. The stockholders were held estopped to deny the validity of the loan.

Union Nat'l Bank vs. Matthews, 98 U. S. 621, is a leading case and holds that where it is simply a question of authority to contract, a party who has had the benefit of the transaction cannot question its validity.

Hitchcock vs. Galveston, 96 U. S. 341, holds that although there may be a defect of power to make the contract, if the corporation has by its promise induced the other party to perform his part of the agreement, the corporation is liable on the contract.

Savings & Loan Co. vs. Convent, 133 Fed. 354, arose in this circuit. The convent sought to set aside its mortgage to the loan association because of the want of power in the convent to purchase stock in the loan asso-

ciation. Your Honors held the defense was not available, and the contract was enforced although in some respects unfair and inequitable. Your Honors also held that the contract was to be measured by the laws and decisions of Washington; and, reviewing the decided cases, summarized them in support of the rule that where a corporation has accepted the benefits of a contract, it is estopped to deny the validity of the instruments by which the benefits came to it.

Barr vs. New York Railway Co., 125 N. Y. 263.

In this case the directors of a railway corporation, who were substantially its sole stockholders, caused to be organized another railway corporation to build a projected line of which they were also the officers and sole owners of the stock. As such they entered into a construction contract which called for the exchange of an exorbitant sum in mortgage bonds and stock, for the construction of the proposed line, and through an assignee, personally received the benefit from the same. After construction, they caused the first company to become the lessee of the second company under a rental agreement which guaranteed the payment of interest on the stocks and bonds so issued. Thereafter they lost control of the lessee company, and of much of the bonds and stock of the lessor company. In a suit to compel the lessee to pay the guaranteed rental, it was held that although both the construction contract and the lease were invalid, yet as at the time they were made, all the parties in interest had consented thereto, all such parties and both corporations would not be heard to assert its invalidity.

We do not concede that the Commonwealth Co. did not receive money's worth for its agreement of guaranty. It had property at stake liable to be foreclosed and lost. It was relieved of the burden to its business caused by the expenses of an unnecessary plant. Its business was relieved of the burden it was carrying of a large debt at a high rate of interest and due in substantial payments. These were property within the definition that all which may afford a valuable consideration constitutes property, corporeal or incorporeal. It is idle to assert that in truth and in fact the interest represented in the Commonwealth Co. and the interest represented in the Title Insurance and Investment Co. of Tacoma were not one and identical. It was one interest which made the purchase in 1909. It was one and the same interest which modified the terms of the purchase in 1911. While at law the theory of legal corporate entities may control, equity will always go behind it to seek out the real parties and the real interests and will never permit the fiction to accomplish a wrong or bring about injustice.

United States vs. Lehigh Valley Ry., 220 U. S. 257; s. c. 55 Law Ed. 458. .

United States vs. Milwaukee Refrig. Transit Co., 142 Fed. 247.

Higgins vs. Cal. Petro. and Asphalt Co., 122 Cal. 373; s. c. 55 Pac. 155.

Bennett vs. Minott, 28 Ore. 339; s. c. 44 Pac. 288.

United States vs. Lehigh Valley Ry., 220 U. S. 257, was a prosecution under the "Hepburn Act." The railway company had organized the Lehigh Valley Coal

Company and operated it "as an agency, or dependency, or department of the railway company." The trial court, holding to the theory of corporate entities, refused to permit allegations showing the identity of interests of the corporations. The Supreme Court swept aside the fiction for the reality, and restrained the railway from transporting its dependent company's coal.

United States vs. Milwaukee Refrigerator Transit Co., 142 Fed. 247, arose in the Sixth Circuit. The Pabst Brewing Co. had caused the Transit Company to be organized to take over its transportation business but the corporations were identical in interest. The case arose under the Elkins Act. Judge Sanborn said: "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of a legal entity is used to defeat the public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction * * *"

Higgins vs. Cal. Petroleum & Asphalt Co., 122 Cal. 373. A corporation held a lease under which it mined asphalt on royalty. Its stock was owned substantially by one person, who organized a new corporation with the same officers, objects and place of business, and took all its stock on the sole consideration of a debt owed to him by the old company, which transferred all its lands, business and assets to the new company, except the min-

ing lease, and practically went out of business. It was held that in equity the new company was the old company under another name and hence was liable for royalties under the lease.

Bennett vs. Minott, 28 Ore. 339, was a case where a debtor had organized a corporation to which he transferred his property. In a suit by his creditors, the argument was that inasmuch as he had taken stock for the full value of the assets which the corporation now owned, the creditor could take only the stock and could not take the assets. The court refused to be bound by the legal rule, saying: "Under these circumstances, although the corporation was organized in due form of law and has a valid corporate existence, the legal rules which regard it as an entity distinct from the real parties in interest, and its stock as property subject to sale under execution, must go down in this attempt to consummate a fraud by legal forms. Equity is not bound by the rules of law in this respect."

See *Spokane Merchants Association v. Clere Clothing Company*, 84 Wash. 616, where an attempt to invoke the corporate entity theory to avoid a debt was not successful. There defendant had organized a corporation whose stock was owned and controlled by its officers. This corporation was held to be the *alter ego* of defendant, the Washington court holding to the rule:

"Courts no longer hesitate to look through form and substance and ignore a mere colorable corporate entity, to the end that rights of third parties may be protected."

SIXTH ASSIGNMENT OF ERROR.

If the court should find that the agreements of the Commonwealth Co. are fairly within the inhibition of the constitution, it does not follow that the individual warranty of the individual defendants should not be enforced against them. The acts which the constitution prohibit are not *malum in se*. The powers which the constitution says that corporations shall not exercise are powers which natural persons exercise in the ordinary course of business. No one would attempt to assert that an individual may not lend his credit or make such guaranties as he pleases. In any event, the constitutional provision means no more than that corporations are under a disability in this respect, as an individual like a minor, or insane person may be incapacitated. It appears that when the contracts were made, there was some doubt in the minds of the parties as to the power of the Commonwealth Co. to make these agreements. That doubt, the appellant says, was whether or not the contracts were *ultra vires*, and the guaranty was given to remove that doubt and create an estoppel, which would undoubtedly be its legal effect at least. The respondents assert that the doubt was as to the validity of the agreements, not as to the power of the corporation in the premises. If the position of the respondents is correct and their defense in this respect is good, then all the parties were doing a vain and empty act. It is conceded that able and experienced counsel were engaged on both sides, and it seems unreasonable that the then mortgagees should surrender a good, valid and sufficient security for one open to such serious question.

If the constitution merely places corporations under a disability as to agreements and obligations like those at bar, then the guaranty of the individuals comes into full force and effect. It was a guaranty that the corporation had in fact the capacity to make the agreements; that the corporation had received good and sufficient consideration therefor, and that its agreements were binding upon the corporation. Its wording was as follows:

“The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg and Franklin Fogg, in consideration of the accepting of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof is based upon a valuable consideration, sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said company.”

If words have any meaning, certainly the individual guaranty has the force and effect we claim for it. If the individuals who made it did so, not merely to guarantee against an *ultra vires* act but to insure the other parties against the failure of the agreements by reason of the constitutional provision (and such is their testimony; see record, pages 129-130) and to induce the other parties to rely upon the binding force and effect thereof (and such is the effect of their recitals; see record, second “whereas” clause, p. 25; recital in agreement of individuals, p. 29; recital in corporate resolution of Commonwealth Title Trust, p. 58; testimony of

Fred S. Fogg, pages 129-130) then the equities are still stronger in favor of the guaranty against the guarantors. The case falls squarely within the doctrine of waiver which we have hereinbefore pointed out, and the court will be quick, under the circumstances, to apply it.

The disability of the principal debtor is no defense to the guarantor, for indeed this may be the very reason, as in the case at bar, why the guaranty is given. The common form of guaranty is that, if the principal does not pay, the guarantor will. This is not the common form. Here the guarantors in effect say that the principal shall be forced to pay over and above any objection which the guarantors or anyone else may raise. In disregard of their guaranty, the individual defendants now ask the court to join them in disregarding their solemn engagements. Here again the respondents take a position which equity does not favor.

There can be no basis for reasonable argument that to issue a bond or other obligation for the payment of money, except for money or property received or labor done, is to do that which is inherently vicious or dishonest. If it were otherwise, the kindly impulse which leads a man to stand good for the debt or default of his friend, would come under the ban of the law. Under any theory, the constitutional provision merely incapacitates a single class, viz.: corporations, from exercising a power that all other classes exercise at will, for there is no limitation at law upon natural persons, acting in their own right, from entering into such obligations as they please, or guaranteeing what they will for others,

provided the subject matter of the obligation or guaranty is not inherently vicious. Only an inherent vice can relieve a guarantor of his obligation; for it is a universal rule of law that a guarantor is not relieved by any disability which is personal to his principal. Thus one who guarantees the undertaking of a minor; or, in the common law states, of a married woman; or of an insane person, or any natural person under a disability which runs to his capacity to make the contract, is not thereby relieved of liability upon his guaranty. The want of power in a corporation to make a given contract stands upon the same footing as the incapacity of an individual; indeed, the doubt of the corporate power may be the very reason, as in the case at bar, why the guaranty is required.

Backus vs. Feecks, 71 Wash. 509.

Yorkshire Ry. Wagon Co. vs. McClure, 19 Ch. Div. 478; S. C. 51 L. J. Ch. 259.

Remsen vs. Graves, 41 N. Y. 471.

Mitchell vs. Hydraulic Stone Co., 129 S. W. (Tex.) 148.

Jones vs. Thayer, 12 Gray (Mass.) 443.

Brandt: Suretyship and Guaranty. Pages 334 and 352.

Backus vs. Feecks, 71 Wash. 509, holds that the guarantors of a contract, not inherently vicious, are bound by their guaranty even though the contract cannot be enforced against the principal. This case stands as the *lex loci contractus*. It cites with approval the *Yorkshire Railway Wagon* case and *Mitchell vs. Hydraulic Stone Co.* (*infra*).

Yorkshire Ry. Wagon Co. vs. McClure, 19 Ch. Div. 478, was a case where a railway company attempted to incur *an indebtedness in a manner expressly forbidden by an Act of Parliament*. Individuals guaranteed the contract. The guarantors were held to their undertakings, there being nothing inherently vicious in the principal contract; although as to the railway company the contract was absolutely void.

Mitchell vs. Hydraulic Stone Co., 129 S. W. (Tex.) 148, holds the sureties on a corporate contract which the corporation had no power to make and as to which the contract was void.

Remsen vs. Graves, 41 N. Y. 471, holds that one who guarantees a bond thereby estops himself from asserting, in an action on his guaranty, that the makers of the bond were not competent to contract in the manner that the principal undertaking shows that they did.

Jones vs. Thayer, 12 Gray (Mass.) 443, holds that it does not lie in the mouth of a guarantor to say that the undertaking which he guarantees is not a valid and subsisting obligation.

Brandt: Suretyship and Guaranty, pp. 334 and 352, states the rule tersely: "A surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are inherent to the debt, but not those which are personal to the debtor. * * * If the invalidity of the contract rests upon reasons personal to the principal, the principal acquires a personal defense against the contract; but the contract subsists and the sureties may be charged thereon. The disability of the principal may be the very reason why the surety was required."

SEVENTH ASSIGNMENT OF ERROR.

The agreement of mortgage and pledge by the Title Insurance and Investment Co. of Tacoma to the Traders Trust Company of Oregon, contains the following provision (*Italics are ours*) see record, p. 23, par. 5:

“Time shall be and is of the essence of this agreement and in the event of the failure of the first party *to pay any of the said notes at the time specified in said notes*, or to pay any taxes which the first party agrees to pay, and after the continuance of such default for the period of one (1) year, then the whole of said notes shall, at the option of the second party, forthwith and without notice, mature, and the second party shall be entitled forthwith to foreclose said pledge. Defaulted interest shall bear interest at five (5%) per cent per annum from the default until paid.”

The principal of the first of the notes fell due December 7th, 1915.

This suit was begun February 8th, 1916, which was less than one year after default of the principal of said first note.

The notes referred to in the agreement aforesaid were similar in tenor and effect, except as to time of maturity, and are as follows: See record, p. 144:

“\$2500.00

Tacoma, Wash., December 2nd, 1911.

On or before December 7th, 1915, after date, without grace, we promise to pay to the order of the Traders Trust Company of Oregon, Two Thousand Five Hundred and no/100 Dollars in

Gold Coin of the United States of America of the present standard of value with interest thereon in like Gold Coin at the rate of five per cent per annum from date hereof, until paid, for value received. *Interest to be paid semi-annually at Tacoma and, if not so paid, the whole sum of principal and interest to become immediately due and collectible, at the option of the Holder of this Note.* And in case suit or action is instituted to collect this Note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, a reasonable sum. Dollars in like Gold Coin for attorneys' fees in said suit or action.

Due Dec. 7th, 1915.

The Title Insurance and Investment Co.
of Tacoma.

By H. H. Gove, P."

The agreement of Guaranty of the Commonwealth Title Trust Co. contained the following clauses: See record, pp. 26 and 27.

"The said Commonwealth Title Trust Company does hereby guarantee to and with the Traders Trust Company of Oregon, the payment of the first seven of said notes and each and every of said seven notes in accordance with their terms and conditions, *and further guarantees to and with the said Traders Trust Company of Oregon, the payment of the interest in accordance with the terms of each and all of the thirty-two (32) notes referred to above, at the times specified in each of said notes, down to and including the interest maturing December 7th, 1921* * * *

“It is further agreed, that time shall be and is of the essence of this agreement of guaranty, and in the event of any failure or default *in any payment hereby guaranteed to be made* and of the continuance of such default for a period of ninety days, after written notice thereof to the guarantor in writing, the Traders Trust Company of Oregon, its successors or assigns, may bring a proper action against such guarantor, *and in the event of the continuance of such default for a period of one year*, after such default shall have been made, *then the whole amount covered by this guaranty shall forthwith and without notice become due and payable*, at the election of said Traders Trust Co.”

The interest payment due December 7th, 1914, in the sum of \$2,000 was defaulted (See record, complaint, Par. IX, p. 8; answers, Par. VI, p. 37; answers, Par. VI, p. 63) and due notice was given thereof (See record, Par. IX, p. 90). Suit was not brought until more than a year after this default.

The mortgage given by the Commonwealth Title Trust Co. to the Traders Trust Company of Oregon, contains the following provision: See record, p. 32.

“*Upon any default on the part of the party of the first part in the payment of principal or interest when due or in keeping and performing any of the above agreements and the continuance of such default for one year*, said party of the second part, its successors or assigns, may elect to declare all sums secured hereby due and payable without notice, including the then value of the unpaid guaranteed interest figured on the

basis of 5%, and including on all defaulted interest at 5% per annum, and *may immediately* cause this mortgage to be foreclosed in the manner provided by law, whether he or they shall elect to pay any of the sums above referred to or not."

These agreements were made at the same time, between the same parties, upon the same subject matter, and substantially as one transaction. It is true that the several corporate bodies were the formal parties to the agreements, but the testimony is clear that the negotiations were conducted and the agreements were reached by the Foggs and Gove on the one side and Smith and Willoughby on the other. The apparent difference in the agreements as to the time when the debt matures is one of form rather than of substance, and clearly arises from an inadvertence on the part of the scrivener who drew the agreements rather than any failure of the minds of the parties to meet as to this one feature of the agreements. It will be noted: (a) The *notes* which evidence the principal debt provide that the *interest* shall be paid semi-annually at Tacoma, and, if not so paid, the *whole sum of principal and interest* shall become immediately due and payable at the option of the holder. (b) The *contract of guaranty* provides for and guarantees the payment of the *principal sum* in accordance with the terms of the notes, and further guarantees by a separate and distinct clause the payment of the *interest* in accordance with the terms of the notes. It further provides that time is of the essence of the agreement, and in the event of *any failure or default in any payment* guaranteed, and the continuance

of such default for one year, then the *whole amount* covered by the guaranty shall forthwith and without notice *become due and payable*. (c) The mortgage given by the Commonwealth Co. provides that upon *any default* in the payment of *principal or interest* and the continuance of such default for one year, *all sums* secured by the mortgage shall become *due and payable without notice*. (d) Of all the agreements in writing, the mortgage and pledge of the Title Insurance and Investment Company of Tacoma alone *omits* to state in terms that a default in payment of interest shall mature the debt. It does not contain any expressly contrary provision, but merely omits specifically to mention a default in interest. It does not even mention specifically the *principal* of the notes, but contents itself by reciting: "In the event of the failure of the first party to pay any of said notes at the time specified." If the word had been: "To pay the principal" of said notes, the respondents' case would have been stronger, but not even then controlling. If, of course, the wording had been as it was in every other instance in the writings: "To pay the principal and interest," then there would be no possible ambiguity. It would seem that since the clause refers to the payment of the "notes" the parties must have meant in accordance with the payments which the notes themselves called for, which specifically require the payment of interest semi-annually and further provide for immediate maturity of the principal and interest, if not paid.

The court below held the suit premature as to the foreclosure of the mortgage and pledge of the Title

Insurance and Investment Company of Tacoma, giving to the provision which we have pointed out controlling importance and interpreting it to mean that no suit could be brought prior to December 7th, 1916; ignoring all other writings, within or without the agreement of pledge, and refusing to consider any apparent ambiguity. In this the court was clearly in error.

Bell vs. Engvolsen, 64 Wash. 33.

Grand Island Association vs. Moore, 59 N. W. (Neb.) 115.

Black vs. Reno, 59 Fed. 917.

Bell vs. Engvolsen, 64 Wash. 33, presented for determination the same question as the case at bar. The note provided for interest at a certain rate until paid. The mortgage provided for interest at the same rate until paid, payable semi-annually, and provided further that in case of default of principal or interest foreclosure could be had. It was contended that the mortgage could not operate to enlarge the terms of the note and nothing was due until the maturity of the note. In that respect the case was the opposite of the case at bar. But the court upheld the rule for which we contend here, saying: "When a note is made and a contemporaneous writing is made to secure or qualify it, the two instruments, *when not conflicting*, will be construed together so that effect may be given to both. The purpose of the court is to gather the intent of the parties, not from one writing, but from all of them.

* * * There being no conflict in the terms of the two writings, and the intention of the parties to pay

interest semi-annually being manifest, the whole debt, by reason of this default, became due, and the decree was properly entered." In the case at bar there is no conflict between the notes and the agreement. The agreement merely omits to set out all that the notes contained. The authority cited is the *lex loci contractus* and is controlling.

Grand Island Association vs. Moore, 59 N. W. 115, reviews the law, cites many authorities and holds: "The last objection made was that the proceeding was premature. The note was made payable on or before March 23rd, 1892, with the following provision: 'The payer has the option of paying the interest as above at the end of each year, or of having it added to the principal, to draw thereafter the same rate of interest.' The mortgage provided that if the mortgagors should fail to pay the money when due, or to pay taxes or insurance, or to pay the dues and fees on the stock as they became due, then the plaintiff might elect to pay the same, and declare the whole amount due and payable at once. * * * In this state it has been determined that in deciding such questions the note and mortgage should be construed together. (Citing cases.) *Buchanan vs. Insurance Co.* was a case much like that before us. A personal judgment had been rendered in the foreclosure case, and it was there held that the provision in the mortgage should be construed in connection with the note, and that a failure to pay interest coupons entitled the mortgagee to a personal judgment for the whole debt. *Bank vs. Peck* was a suit upon notes under similar conditions. The court there held,

under an opinion by Brewer, J., that the notes and mortgage were to be construed together, that all notes became due upon a failure to pay one, and that the statute of limitations ran against all from that time."

* * *

Black vs. Reno, 59 Fed. 917, holds as follows: "It is objected that this action is premature for the reason that, by the terms of the mortgage deed, no foreclosure is permissible until after the maturity of the ten-year note. The first note and all of the interest thereon were past due when this suit was instituted. If this action is to be postponed * * * the situation of the creditor is most unfortunate. * * * Before a court of equity would give a construction to the mortgage productive of such dire results, it should clearly appear on the face of the mortgage deed that it was within its terms that the mortgage should be so postponed. Of course a court of equity could not, in this action, afford relief against the express contract of the parties. The courts universally hold that, under a mortgage to secure a debt payable in installments, the right to foreclose arises on a default in any one installment; and there is a strong disposition and tendency in the courts of chancery to apply this rule to defaults in the payment of annually accruing interest, in the absence of any provision clearly interdicting the right. 2 *Jones: Mortgages*, Secs. 1176-77. They combat the position, often taken by counsel, that such interest ought not to be considered in the light of an installment of principal, but they assert that interest unpaid becomes principal protanto. In *Seaton vs. Twyford*, L. R. 11 Eq. 591,

the Chancellor, *inter alia*, observed: 'It is not in my opinion open to question that, if the case were taken into chambers for the purpose of preparing a mortgage deed, under such decree as I have mentioned, the mortgage would not be in the most ordinary form, giving five years to pay the mortgage money, but making it a condition of that postponement that the interest, in the meantime, should be paid. The failure to pay the interest in a mortgage prepared in the most ordinary form would release the mortgagee from the necessity of waiting five years before he exercises such powers as a mortgagee possesses. The mortgagor who stipulates that he shall have five years to pay the mortgage must, of necessity, whether it is expressed or not, undertake at the same time that, if he fails to do that which is incumbent upon him during the period of five years to do, the restrictions upon the mortgagee (that is, to wait five years on the mortgagor) should cease.' "

Finally, the court below refused to take into consideration the fact that defendants below had refused to pay the debt or any part of it, not because there was a payment then due, but because they declared there was no debt. (See record, testimony of Horace Fogg, p. 136.) They had been advised by counsel that the agreements were void, and they had accepted the advice and were acting under it. Under such circumstances they again appear in a poor light to plead that they were brought into court too soon.

Coley vs. Mills, 100 Pac. (Ky.) 69.

1 Cyc. actions 742.

EIGHTH ASSIGNMENT OF ERROR.

We believe that we have shown clearly that the court below was in error in each and every of the matters heretofore presented. Having once turned its back to the true light, the court went further and further into the darkness. *Facile descensus Averno.*

At the threshold of the case, the court imputed to all the parties, unsupported by any testimony and in fact in the face of the direct statements of the defendants, a sinister purpose to impose upon the people of Pierce County a monopoly of the preparation of abstracts of title, and found all subsequent dealings were tainted by reason thereof. The court ignored the statutes and decisions of the State of Washington relating to the nature of abstracts of title, took in place thereof an obsolete definition from a dictionary and a statement from Shakespere, who was a better joker than a jurist. On this basis the court gives to monopoly a meaning which would more than satisfy a middle-of-the-road populist, and sets aside contracts solemnly entered into by intelligent, prudent and careful business men. To the two constitutional provisions of the State of Washington, the court gives a strained construction, stretching them upon the bed of Procrustes, the famous robber of Eleusis, who placed his victims upon a bed and lopped off or stretched their limbs to make them fit the couch on which he wished them to lay. This method must make cripples of those who should be the sturdy in the world of business. Proceeding further, the court emasculates the guaranty of the individual defendants, which was an evidence of their good faith at least, if it

was anything at all. Finally, the court declared the subject still-born and left all further matters to the undertaker. In all these matters the court from the beginning to the end gives no weight to and does not even discuss or distinguish the rules and decisions of Washington which control the interpretation of these agreements. The decree should be reversed.

NINTH ASSIGNMENT OF ERROR.

The decree should be reversed with instructions to the court below to enter a decree as prayed for in the complaint, which is strictly in accordance with the agreements of the parties. (See record, p. 27.)

In addition, the parties having so stipulated (see record, p. 115), the decree should provide that the defendant Commonwealth Title Trust Company shall turn over to plaintiff the "take-offs" provided for in the contract within sixty days from the entry of the decree; failing which, judgment against said company in the sum of \$20,000 should be rendered as to this item.

Respectfully submitted,

FRANK H. KELLEY,

JOHN H. HALL,

ROBERT M. DAVIS,

FRANK C. NEAL,

For Appellants.

IN THE
**United States Circuit Court
of Appeals**

For the Ninth Judicial Circuit.

LUMBERMEN'S TRUST COMPANY,
Trustee,

Appellant,

vs.

TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA, a corpora-
tion, COMMONWEALTH TITLE
TRUST COMPANY, a corporation,
HORACE FOGG, FRED S. FOGG,
HERBERT GOVE AND ALVA FOGG,
administratrix of the estate of
FRANKLIN FOGG, deceased,
Appellees.

Filed

SEP 6 - 1917

F. D. Monckton,
Clerk

*Upon Appeal From the United States District Court
For the Western District of the State
of Washington.*

BRIEF OF APPELLEES

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EDWARD FOGG,

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IN THE
**United States Circuit Court
of Appeals**

For the Ninth Judicial Circuit.

LUMBERMEN'S TRUST COMPANY,
Trustee,

Appellant,

vs.

TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA, a corpora-
tion, COMMONWEALTH TITLE
TRUST COMPANY, a corporation,
HORACE FOGG, FRED S. FOGG,
HERBERT GOVE AND ALVA FOGG,
administratrix of the estate of
FRANKLIN FOGG, deceased,

Appellees.

*Upon Appeal From the United States District Court
For the Western District of the State
of Washington.*

BRIEF OF APPELLEES

STATEMENT OF CASE

Appellant's statement of the case falls so short of being a complete statement of the issues, that we feel called upon to make a more complete state-

ment that the Court may at the outset have all of the issues of the case before it.

This action was brought in the United States District Court for the Western District of Washington, Southern Division, by the Lumbermen's Trust Company, an Oregon corporation, against Title Insurance & Investment Company of Tacoma, a Washington corporation (hereinafter called T. I. & I. Company of Tacoma), Commonwealth Title Trust Company, a Washington corporation (hereinafter called Commonwealth Company), Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove (hereinafter called the Fogg and Gove); the object was to recover a judgment against T. I. & I. Company of Tacoma for Eighty Thousand Dollars and interest, and for a decree of foreclosure and sale of the property pledged to secure said indebtedness, as set forth in the chattel mortgage attached to the complaint marked Exhibit "A." (Record, p. 21.)

Second: For a judgment against the defendant Commonwealth Company on an instrument of guaranty, attached to the complaint marked Exhibit "B" (Record, p. 25), and for a decree of foreclosure of the mortgage given to secure said guaranty, which mortgage is attached to the complaint marked Exhibit "C" (Record, p. 30), and a prayer for alternative relief that if for any reason the agreements and undertakings of the Commonwealth Company be found by the Court to be not valid,

then the plaintiff have judgment against the defendants Foggs and Gove for such sum as may be found by the Court to be due upon the guaranty of the Commonwealth Company, and also for costs and disbursements, including an attorney fee of Ten Thousand Dollars (See Amended Bill of Complaint, Record, p. 2.)

Exhibit "A" was a chattel mortgage executed December 2nd, 1911, upon the abstract plant of the T. I. & I. Company of Tacoma, which property was, at the time of the execution of the mortgage, being used in the abstract business in Pierce County, Washington, by said T. I. & I. Company of Tacoma, and embraced simply property in Pierce County. That mortgage provided in Paragraph 2 that said abstract plant should be shipped to the City of Portland, Oregon, and there placed in a vault to be there kept under lock and key during the life of the agreements entered into on December 2nd, 1911.

Contemporaneous with the execution of Exhibit "A," and for the purpose of securing the performance thereof, Exhibits "B" and "C" were executed.

The defendants Commonwealth Company and T. I. & I. Company of Tacoma filed separate answers and by stipulation the answer of the Commonwealth Company is to be taken and considered as the answer of the individual defendants Foggs and Gove. The defendants by these answers admit

the execution of Exhibits "A," "B" and "C," attached to the complaint, but deny that there was any valid consideration for the execution of either or any of them.

Defendants as affirmative defenses to the complaint alleged:

(a) That the complaint does not state facts sufficient to constitute a valid cause of action in equity against the defendants, or either of them, nor are the facts stated therein sufficient to entitle plaintiff to any relief against the defendants, or either of them.

(b) That all of said instruments and agreements set forth in the complaint were, and are, illegal and void, and of no force and effect, for the reason that the sole and only consideration for the execution of the same was for the purpose of removing and restraining rivalry and competition in the abstract business in Pierce County, Washington, and were in restraint of trade and competition, and were for the purpose of giving the defendant Commonwealth Company a monopoly of said business.

(c) That the Commonwealth Company was, and is engaged solely in the business of making and selling abstracts of title to lands in Pierce County, and maintaining an abstract plant in Tacoma in said County and State. That it was not authorized by its articles of incorporation, nor was

it engaged in the business of becoming surety or guarantor for any person, firm or corporation for the contracts, undertakings or obligations of third parties. That Exhibits "B" and "C," attached to the complaint, were made and executed wholly without consideration, and said Commonwealth Company neither directly or indirectly received any consideration, or money, or property or labor, or thing of value therefor, or in connection therewith, nor were its assets in any way increased thereby.

(d) The fourth affirmative defense consists of a partial defense as to interest. (See Record p. 35.)

The answer of the defendant T. I. & I. Company of Tacoma was substantially the same as the answer of the defendant Commonwealth Company, but it contained a further partial defense to the cause of action set forth in plaintiff's complaint that said action was prematurely brought as to the defendant T. I. & I. Company. (See answer of defendant T. I. & I. Company, Record pp. 61-74.)

The action was tried before Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, upon an agreed statement of facts (Record, pp. 75-114), and certain oral testimony, and on October 9th, 1916, the Court having heretofore filed its opinion sustaining defendants' contention under their several affirmative answers (Record, pp. 153-184), rendered a judgment and decree in favor of defendants in ac-

cordance with said opinion (Record, pp. 193-202), from which said judgment and decree this appeal is prosecuted by the plaintiff.

STATEMENT OF FACTS.

The honorable judge of the Lower Court in his opinion made very full findings of fact, and we believe that the same contains a clear, concise and complete statement of the facts at issue in this case, and we therefore adopt it as a statement of facts, subject later in our argument to be supplemented with other facts that appear from the evidence. Said statement is found in the record on pages 156 to 163, and is as follows:

“This cause was tried by the Court upon stipulation as to the facts.”

T. I. & I. Company, of Washington, a corporation of which A. D. Willoughby and O. M. Smith and wife were the sole and only stockholders; Commonwealth Company, of which the Foggs and Gove, and executors of the estate of Charles S. Fogg, deceased, were the sole and only stockholders, and Wilson Title & Abstract Company, a corporation, (hereinafter designated as the Wilson Company) in which R. C. Wilson was substantially the sole stock holder, each maintained, owned and operated in the City of Tacoma, an abstract business, used, and intended to be used, for furnishing abstracts of title of property within Pierce County, Washington.

That during all of said time the said companies had carried on business in active and actual competition with each other, and for many years prior to said date said companies owned and controlled the only abstract plants in said county, and transacted all of the abstract business therein.

That the competition between said companies was very keen, and they were cutting prices.

That for some days prior to December 6, 1909, the Foggs, Willoughby and Smith had been negotiating the sale of the abstract plant of the T. I. & I. Company of Washington to a corporation to be formed.

That during said negotiations, and on the 6th of December, 1909, the Wilson Company executed and delivered to Willoughby, then in the actual management of the T. I. & I. Company of Washington, and Franklin Fogg, then in the management of the Commonwealth Company, a lease and option to purchase the entire plant and business of the Wilson Company.

That on the 7th day of December, 1909, the said Willoughby by written assignment transferred to said Franklin Fogg his interest in said lease and option to purchase, a copy of which is attached to said lease and option. That by said lease it was provided among other things that said abstract plant should remain in the exclusive possession of the Wilson Company, but should not be operated, and

in Paragraph V., it was further provided that said Wilson Company and its officers should not during the life of said lease start, or be interested in any other abstract plant in Pierce County, Washington.

That on the 7th day of December, 1909, the same day that Willoughby assigned his interest in the Wilson lease to Fogg, the T. I. & I. Company of Tacoma was organized, with a capital stock of \$5,000.00, and purchased from the T. I. & I. Company of Washington its abstract plant and business for the sum of One Hundred Thousand Dollars, payable Ten Thousand Dollars in cash, balance of Ninety Thousand Dollars secured by a mortgage upon the plant. Part control in the new company was preserved in the seller and the mortgage given provided that the mortgagor would use its best efforts to enlarge and build up the business. The original stockholders of said T. I. & I. Company of Tacoma were said Willoughby, one A. F. Albertson and F. A. Rice—Willoughby subscribing for forty-eight shares, and the other two for one share each, being the whole of the capitl stock—two of the Fogg's idemnified him for his subscription for such shares. That on said day the said Willoughby assigned his stock in blank and delivered it to Fred S. Fogg, and afterwards on the 30th day of December, 1909, the stock certificates in said T. I. & I. Company of Tacoma were surrendered and the same were duly issued to the Fogg's and Gove for all of the capital stock of said company, the par value of which said

stock was duly paid by said stockholders to the T. I. & I. Company of Tacoma.

The result of these transactions was to leave the entire abstract business in Pierce County in the hands of the T. I. & I. Company of Tacoma, and the Commonwealth Company, in which two companies the stockholders were substantially the same.

The said mortgage and notes of Niney Thousand Dollars executed by the T. I. & I. Company of Tacoma, to the T. I. & I. Company of Washington for the part purchase of the said abstract plant of the latter company were assigned to the Traders Trust Company of Oregon, an Oregon corporation, and that at all times mentioned in the complaint and answer the said Willoughby and Smith and wife were the officers and sole stockholders of the said Traders Trust Company of Oregon.

The T. I. & I. Company of Tacoma paid to the T. I. & I. Company of Washington the semi-annual interest on its mortgage, due June 7, 1910, amounting to \$3,150.00, and a like amount on December 7th, 1910, and also paid the installment of principal of Ten Thousand Dollars, due December 7th, 1910. It also paid \$2,800.00, the interest due June 7th, 1911. Said payments amounting in all to \$29,100.00, and on the 7th day of December, 1911, there would become due an interest payment of \$2,800.00, and an installment of principal of \$5,000.00.

During the summer of 1911 correspondence took place between Horace Fogg, a stockholder in both the Commonwealth Company and the T. I. & I. Company of Tacoma, and Willoughby, looking towards an adjustment of this mortgage indebtedness.

It is clearly shown from these letters and the other evidence that the T. I. & I. Company of Tacoma could not make this payment of interest and principal about to become due, and that some adjustment would have to be made, or the mortgage would be foreclosed and the plant taken back by the Willoughby and Smith interests, or sold under foreclosure sale to some third party and operated as a competing plant.

On said December 2nd, 1911, said Traders Trust Company of Oregon, being then the owner and holder of said notes and chattel mortgage, dated December 7th, 1909, executed by the said T. I. & I. Company of Tacoma, and said last named company, executed and delivered to each other the pledge agreement, dated December 2nd, 1911, ~~pledged agreement, dated December 2nd, 1911,~~ now sought to be foreclosed, and also the thirty-two notes, to secure which the same was given, all dated December 2nd, 1911, for the principal sum of \$2,500.00 each, making an aggregate sum of Eighty Thousand Dollars, the same being payable one note each year on and after December 7th, 1915, with interest thereon at the rate of 5 per cent per annum, payable semi-annually.

At the same time, on December 2nd, 1911, and as a part of the same transaction, said Traders Trust Company cancelled and delivered up to the T. I. & I. Company of Tacoma the notes dated December 7th, 1909, that were executed by said T. I. & I. Company of Tacoma to evidence the deferred payments of the original purchase price of said abstract plant from said T. I. & I. Company of Washington. At the same time, on said December 2nd, 1911, said Commonwealth Company executed and delivered to said Traders Trust Company of Oregon its guaranty agreement dated December 2nd, 1911, guaranteeing payment of the first seven of said thirty-two notes, and guaranteeing payment of the interest on all of said thirty-two notes to and including the interest due December 7th, 1921, and also executed and delivered its real estate mortgage to secure said guaranty agreement, and also a certified copy of the resolution of the stockholders and trustees, of said Commonwealth Company, dated December 2nd, 1911, authorizing the same.

The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg and Franklin Fogg, in consideration of the acceptance of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof, is based

upon a valuable consideration, sufficient in law to bind the Commonwealth Trust Company, and that the same is a valid and subsisting obligation of said Company. This guaranty by these individual defendants appears to have been given because of a question having arisen as to the binding effect of the guaranty and mortgage given by the Commonwealth Company.

Within a day or so after December 2, 1911, said Willoughby and Smith prepared, signed and delivered an agreement not to enter the abstract business in Pierce County, the agreement being in the following words:

“To the Title Insurance & Investment Company of Tacoma, Washington,
Gentlemen:

In consideration of the agreements which have been this day made between you, the Title Insurance & Investment Company of Washington, the Commonwealth Title Trust Company and the Traders Trust Company of Oregon, we, the undersigned individuals, who are the principal stockholders of the Title Insurance & Investment Company of Washington, and also of the Traders Trust Company of Oregon, do hereby covenant and agree that as long as the agreements on your part and on the part of the Commonwealth Title Trust Company and on the part of Fred S. Fogg, Horace Fogg, Frank Fogg, and Herbert H. Gove, are kept and per-

formed, we will not, nor will either of us, directly or indirectly, as individuals, or through the medium of any corporation, transact an abstract business or a title insurance business in Pierce County, State of Washington.

In Witness Whereof, we have hereunto set our hand this 2nd day of December, A. D. 1911.

A. D. WILOUGHBY,
O. M. SMITH."

Although it is disputed that this was a part of the other transactions of December 2nd, 1911, the preponderance of the evidence shows that it was, and so understood. The very fact that the agreement was given the same date, to my mind, shows this. The Commonwealth Company never received any money or property, or labor on account of its execution of said guaranty agreement and real estate mortgage. The only benefits derived by it from the agreement being the extinction of competition that had previously existed—from the operating of the abstract plant by the T. I. & I. Company of Tacoma and the elimination of the risk, upon the collapse of the latter company, of its plant coming in to the possession of hostile interests to be operated in actual competition to the Commonwealth Company.

That immediately after said December 2nd, 1911, said abstract plant was shipped to Portland, Oregon, and placed in a vault, one of the keys of which was held by Traders Trust Company, and the other by

a representative of that company and the T. I. & I. Company of Tacoma, and has remained there ever since, all as provided in said agreements of December 2nd, 1911.

That at the time of the making and execution of said agreement of December 2nd, 1911, all of the abstract business in Pierce County was being transacted by the Commonwealth Company and the T. I. & I. Company of Tacoma, except about ten per cent. Far the major portion of the business transacted by the two companies being transacted by the Commonwealth Company—the 10 per cent. mentioned being transacted by a new company entering the field between 1909 and 1911. At the time of trial the evidence showed that the percentage of business transacted by this new company had materially increased.

In compliance with its said guaranty agreement, dated December 2nd, 1911, said Commonwealth Company duly paid the interest that became due on said thirty-two notes on June 7th, 1912, amounting to \$2,000.00, and also the interest that became due on December 7th, 1912, amounting to \$2,000.00, and also the interest that became due on June 7th, 1913, amounting to \$2,000.00, and the interest that became due on June 7th, 1914, amounting to \$2,000.00, making a total sum of \$10,000.00 paid by it pursuant to its said guaranty agreement dated December 2nd, 1911.

The abstract business in Pierce County con-

tinued to slump after December 2nd, 1911, and the Commonwealth Company found before December, 1914, that it could not continue to carry on said guaranty agreement without great loss to itself, as on said date not only an interest payment of \$2,000.00 was coming due, but also the principal on the first of said thirty-two notes, amounting to \$2,500.00 additional. An effort was made to readjust matters between the defendants and complainants, but without success. This suit was begun upon the failure of such negotiation.

ARGUMENT

FIRST.

LIABILITY OF DEFENDANT COMMONWEALTH CO.

(A) *Restraint of Trade and Competition and Creation of Monopolies at Common Law.*

The appellee Commonwealth Company insists and maintains that neither the contract of guaranty (plaintiff's Exhibit "B" attached to the complaint (Record, p. 25), nor the real estate mortgage (plaintiff's Exhibit "C," attached to the complaint, Record, p. 30), can be enforced in this action, or any relief granted thereunder, for the reason that the pleadings and documentary evidence show on their face that said contracts were given without any legal consideration, and were given solely for the purpose of removing and restraining trade and rivalry and competition existing in the abstract

business in Pierce County, and for the purpose of inducing the T. I. & I. Company of Washington, Willoughby and Smith and wife, and any other person, or persons, who might become purchaser at foreclosure sale of the plant and business of the T. I. & I. Company of Tacoma to refrain from engaging or entering into the abstract business in competition with the defendant, and for the purpose of giving the defendant Commonwealth Company a monopoly of said business, and was one of several transactions having for their purpose the restraint of trade and competition in the abstract business, and giving the defendant Commonwealth Company a monopoly of said business, all of which said transactions tended to, and did produce such results. This is also sustained by the oral evidence in the case.

The undisputed evidence is, as found by the lower court, that Willoughby and Smith, the real plaintiffs and appellants in this action, aided and abetted in the formation of said monopoly, participated in all of the transactions leading up to the same, and the testimony also shows that the dominant purpose of Willoughby and Smith, and the other parties to said transaction was the suppressing of competition in the abstract business and forming a monopoly in that business.

Contracts in restraint of trade may be divided into three classes:

1st. Where the contract is ancillary to some

lawful act, such as where one person sells his business and goodwill to another he can legally contract that he will not engage in the same business for a reasonable length of time, and covering a reasonable territory, but even this kind of a contract will not be upheld where the restraint is unreasonable either as to time or territory, or where the sale or transaction is one of a series of transactions which have for their purpose the restraint of trade or competition, or the monopolizing of business, or where the necessary result of such transaction will accomplish, or tend to accomplish this purpose.

2nd. Agreements of persons not already engaged in business not to engage in business where there is no sale of business, or other legal consideration. Such agreements are held against public policy, illegal and void.

3rd. Where there is no sale by a person engaged in business, of his good will, an agreement by him to discontinue business is illegal and void.

I.

It is conceded that a contract in restraint of trade is enforceable where it is ancillary to some lawful contract involving some such relation as vendor or vendee, partnership, employer and employee, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of such fruits by the other party, but where

such contract is not ancillary to some lawful contract, or where such contract is one of many transactions, the purpose of which is to suppress competition, create a monopoly, or is in restraint of trade, they are universally held illegal and non-enforceable.

U. S. vs. Addyston Pipe & Steel Co., 85 Federal 271-291.

Affirmed by U. S. Supreme Court, 175 U. S. 211. (44th Ed. 136.)

While this is a case under the Sherman Anti-Trust Act the decision is applicable to contracts in restraint of trade generally.

The Sherman Anti-Trust Act is, in reality, an announcement of the common law rule, which maintains in this State concerning contracts in restraint of trade, with some enlarged remedies applicable only to Inter-State commerce.

Pocahontas Coke Co. vs. Powhattan Co., 56 S. E. 264-268, 10 L. R. A. (N. S.) 281.

This question on all of the three branches above referred to is thoroughly discussed in

6 Ruling Case Law, Sec. 190 et seq.

The text in these sections in most instances is taken from some adjudicated case, and the cases in the notes fully sustain the text.

“MONOPOLY, CONSOLIDATION OF
BUSINESS, VALIDITY OF CONTRACT:

1. Contracts by which a corporation which buys up and consolidates all but a small percentage of the ice manufacturing plants of the city, in order to control the market and suppress competition, requires stockholders of the absorbed plants to refrain from re-engaging in the business for a period of ten years, are void as a restraint of trade, and are within a statute declaring guilty of conspiracy any corporation or individual which shall enter into any contract having for its object the limiting of the quantity of any commodity to be produced, and cannot be enforced by a corporation organized to take over the business, property, and contracts of the one which effected the consolidation.

SAME—FAILURE TO RAISE PRICES—
EFFECT.

2. That no effort is made to control, fix, or raise the price of the product of certain plants which have been bought in by one concern to control the market and suppress competition, does not render enforceable a contract by which holders of stock in such concern agreed not to enter into the business within the city for a series of years.”

Merchants Ice & Cold Storage vs. Rohrman,

30 L. R. A. (N. S.) 973; 128 S. W. 599.

Lane vs. Leiter, 237 Fed. 149.

A contract between manufacturers whereby the first party agrees that in consideration of a percentage on the sales made by the second party not to use his plant for the production of strap and T hinges for five years, the contract to be void in case the second party increases his facilities for the production of such industry, is void and against public policy.

Oliver vs. Gilmore, 52 Fed. 562.

The Supreme Court of the State of Washington has had occasion to pass upon this proposition in

Fisher Flour Mill Co. vs. Swanson, 76 Wash. 649-655-656-663.

While the Court in the above case found that the public interest will in no wise suffer for an enforcement of the contract, and enforced the same, they sustain the general proposition above stated.

A contract between the proprietors of the only two first-class hotels in a place to close one for a money consideration to be paid by the proprietor of the other in order to give the latter a monopoly of the business is contrary to public policy and void.

Clemmons vs. Meadows, 6 L. R. A. 847 and note.

Shawnee Compress Co. vs. Anderson, 209 U. S. 423 (52 L. Ed. 365), and note.

The above case holds:

“An Oklahoma compress company, though financially embarrassed, cannot lease its entire property and goodwill to a foreign corporation, with a covenant to lend its assistance to discourage competition against its tenant, and to refrain from engaging in the business of compressing cotton within 50 miles of any plant operated by the tenant, where such lease is executed in pursuance of a plan to assemble under one management or ownership the compression business in the cotton producing states.”

See also *Darius Cole Trans. Co vs. White Star Line*, 186 Fed. 64.

The Court in the above case uses the following language:

“If it was the dominant purpose of both parties, when making the lease, to preserve the monopoly which they had participated in creating, and in maintaining for a period of years, the contract was, in our judgment, none the less invalid, from the fact that the lessor, instead of receiving for the use of the boat a share of the profits of a pool, obtained as annual rental an amount which experience in the pool showed was the average annual earnings assigned to the boat in question—an amount materially larger than the boat could have itself earned while operated under the lease.”

1. "All agreements in general restraint of trade are against public policy and void; but agreements having such partial effect only, made in connection with the purchase of a business and its good will, shown to be reasonably necessary to the enjoyment of the goodwill of the business purchased, and not oppressive, may be enforced.

2. "Where one engaged in the same business as another purchases that of the latter, with its good will, and takes from the latter a stipulation that he will not directly nor indirectly engage in the same business in the state, nor in the United States, for the period of twenty-five years, such agreement necessarily tends to create a monopoly; and, whether necessary or not to the reasonable enjoyment of the goodwill so purchased, the interest of the public in the non-enforcement of such an agreement outweighs the interest of the purchaser in its enforcement, and it is void.

3. "Such an agreement is not devisable, for the reason that, if restrained to the limits of the state, still such restraint would be general in its nature, and obnoxious to all the objections that exist against a general restraint of trade."

Lufkin Rule Co. vs. Fringeli et al., 41 L. R.
A. 185.

Cyc. sums up the proposition in the following language:

“Therefore, according to what seems to be the best considered opinion the rule as to the validity of an agreement ancillary to a sale of a business which is reasonable in other respects, is subject to the qualification that the agreement must not unreasonably restrict the available supply of, or access to, or raise the price of, any useful commodity, or tend to create a monopoly.”

27 Cyc. 900.

Stewart vs. Stearns, 48 Southern 19.

In that case the Court held:

“But a contract not transferring a lawful business, trade, profession or occupation actually engaged in, or not transferring a lawful exclusive right, but containing an agreement to relinquish to another a common natural right not lawfully exclusive, or to refrain from the exercise of a natural right common to all to engage in a lawful business or occupation and other agreements that enable the parties, under the circumstances in which the contract will operate, to control or unduly and injuriously influence the trade relations of a considerable portion of a small community as to necessary and useful commodities may be opposed to public policy, and not enforceable. The fact that the agreements are contained in and are ancillary to a contract of lease of a storehouse does

not relieve them of their illegal effect if their tendency is to restraint of trade or monopoly, to the injury of the public.

“Where a contract places it within the power of the contracting parties to at least partially control the available supply of commodities useful if not necessary to at least a considerable portion of the local public, or to unreasonably limit the places where useful articles may be purchased, or to increase the price and consequently to restrain trade, it is substantially injurious to the portion of the public affected thereby, and is an unreasonable, and consequently an unlawful, restraint of trade, and tends to monopoly, rendering the illegal portions, if not the entire contract, unenforceable because contrary to public policy.”

II.

A person not already engaged in business cannot legally agree not to engage in business, and if such agreement is made it cannot be enforced as being against public policy and in restraint of trade.

A naked agreement by one party not to engage in business in competition with another party is in contravention with public policy and therefore void.

Gross Kelly & Co. vs. Bibb, 145 Pac. 481-489.

Webb Press Co. vs. Bierce, 40 So. 203.

The above case holds as follows:

“A contract whereby a party who contemplates engaging in a lawful business in a particular place, for a pecuniary consideration paid and promised, binds himself not to do so, in favor of another, with whom he had no previous business relations and who is about engaging in the same business at the same place, is void, under the general commercial law, as in unreasonable restraint of trade, and a fortiori is unenforceable when in contravention of an express prohibition of the law of the place where it was made and is to be executed.”

Freudenthal vs. Espey, 102 Pac. 280.

In this case the contract was upheld as being reasonable and of benefit to the covenantee, but the Court in its opinion sustains the proposition contended for by us in the following words:

“Certainly no one would contend that a contract with A, whereby B was restricted in following a trade or practising a profession in a particular place, without more, would be enforceable. It would not be enforceable because it cannot be gathered therefrom that either party would be benefitted thereby, nor would the public.”

Prescott vs. Bidwell, 99 N. W. 93.

A contract in restraint of trade without consideration is void. A completed sale of business is

not sufficient consideration for a subsequent contract by the seller not to engage in the same business in the vicinity within a certain time.

Cleaver vs. Lenhart, 37 Atl. 811.

Smith vs. Kousiakis, 172 S. W. 586.

In this case a contract was held void binding a party thereto to prevent the use for two years of a building for a lunch counter in competition with the lunch business of the other party conducted in the vicinity as in restraint of trade, within revised Statute of Texas, 1911, Article 7796, defining a trust, etc., and in that connection the Court says:

“While the rigor of the early common-law rule has been relaxed, which declares void any contract tending to restrain trade, so that the common law now recognizes as valid many agreements in partial restraint of trade, yet they are limited to covenants when ancillary to a lawful contract, as for instance, an agreement by the seller of a business not to compete with the buyer in such a way as to decrease the value of the business, or by a retiring partner not to compete with the firm, by a partner not to do anything to hinder the business of the partnership, by the buyer of property not to use it in competition with the business retained by the seller and agreements by the lessor of property not to use it in competition with the business of the lessee.

“It is a very general rule that all contracts of this character must be incident to and in support of another contract or a sale in which the covenantor has an interest which is in need of protection. The contract in question is considered by him to be certainly in restraint of trade, and since it is not ancillary to a lawful contract, it must be regarded as unreasonable, contrary to public policy, and void, irrespective of the applicability of Article 7796. *Clemmons vs. Meadows, supra*, and note thereunder.”

Klaff vs. Pratt, 86 S. E. 74.

The grocers in a certain town agreed with a firm which was about to open a butter store, that they would not buy butter for a term of two years; said firm paid nothing to the grocers, nor did it buy out any established business. Held that the contract was void for want of consideration, and also void as being in restraint of trade.

Chaplain vs. Brown, 48 N. W. 1074.

The Court in the above case used the following language, which is applicable to the facts in the case at bar.

“But it appears to us that the decision of the district court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the en-

forcement of the agreement would actually create a monopoly in order to render it invalid, and surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced."

III.

A contract made by a party already engaged in business to discontinue such business without a sale of his business and good will is illegal and void.

Pearson vs. Duncan & Son, 73 So. 406.

Tuscaloosa Ice Mfg. Co. vs. Williams, 28 So. 669-672.

One manufacturer agreed with another engaged in the same business in consideration of \$1,500.00 to cease manufacturing certain articles for one year, the latter having the privilege of renewing the contract for four years more. The agreement was held void as against public policy.

Clark vs. Needham, 83 N. W. 1027.

Chaplin vs. Brown, 48 N. W. 1074, *supra*.

A contract between manufacturers whereby without any sale of the business of the one to the other,

one party is prohibited from manufacturing of pressed metal any parts of a diamond bar truck frame, is void as an unreasonable restraint of trade.

Fox, etc., vs. Schoen et al., 77 Federal 29.

Anderson vs. Jett, 12 S. W. 670.

In that case the Court holds:

“An agreement between owners of two rival steamboats on the Kentucky River, that, in order to prevent rivalry and consequent reduction of charges, the net profits of each should be shared in a certain proportion, each bearing its own expense, and that, if the owners of either boat should sell with a view of going out of the trade, notice should be given to the owners of the other boat, and the owners so selling should not enter the trade again within one year, is void, as against public policy, and the owners so selling may start a new boat within the year.”

Keene Syndicate vs. Wichita Gas Elec. Co.,
76 Pac. 834.

In that case the Court holds:

“A corporation, engaged in the business of generating and furnishing electricity for public and private use, leased to a rival corporation in the city, for a period of 10 years, machinery and appliances used in generating elec-

tricity, obligating itself by the provisions of said lease not to engage in the business of furnishing electric light and power to public or private consumers in the city during said period, and not to dispose of any of its property, machinery or appliances retained by it for producing or generating in said city electric light and power. Held, in an action on said lease to recover rents from the lessee, that the lease is in contravention of public policy, and that no action to recover rents can be maintained thereon by the lessor or its assignee."

Arctic Ice vs. Franklin, 139 S. W. 1080.

Slaughter vs. Thacker, 65 L. R. A. 342, 47 S. E. 247.

Stewart vs. Stearns, 48 So. 19 (supra).

Under whichever of the three foregoing subdivisions the Court may find the transaction of the Commonwealth Company falls, there can be absolutely no recovery against it, for the reason that no other conclusion can be drawn from the evidence, but that the dominant purpose of all parties when entering into these transactions was to give to the Commonwealth Company a monopoly of the abstract business, and to preserve to it the monopoly which they had participated in creating. It must be equally apparent to anyone reading the evidence in this case, that the transaction of the Commonwealth Company was but one of a series of transactions

participated in by the Smith and Willoughby interests, which not only tended to, but did create a monopoly and restraint of trade and competition of the abstract business in Pierce County.

Not necessary to be complete monopoly.

Clark vs. Needham, 83 N. W. 1027, citing
U. S. vs. Knight, 156 U. S. 1 (39 Law
 Ed. 325.)

(B) *Constitutional Provision as to Monopoly.*

I.

Article XII, Section 22, of the Constitution of the State of Washington, provides:

“Monopolies and trusts shall never be allowed in this State, and no incorporated company
 * * * in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or with any co-partnership or association of persons, or in any manner whatever, for the purpose of fixing the price, or limiting the production, or regulating the transportation of any product or commodity. * * *

The testimony and pleadings in this case show conclusively that the agreement entered into in the contract of guaranty marked “Exhibit B,” was a contract and combination limiting the production of

abstracts in Pierce County, and controlling the prices thereof through the creation of a monopoly in the abstract business. This is directly prohibited by the above quoted section of the constitution, and that being true, no recovery can be had on that contract, or the mortgage given to secure the same.

The first question naturally arising is, is an abstract of title a product or a commodity? We maintain that an abstract of title is the product of labor, experience, brains and skill of the person or corporation carrying on that business. An abstract of title is a definite, tangible thing which is traded in.

The pleadings and testimony in this case, however, it seems to us, settle the question that an abstract of title is a product or a commodity. Paragraph II., of the complaint (Record p. 3) alleges that the T. I. & I. Company of Tacoma is authorized to engage in "the manufacture and sale of all kinds of abstracts of title of real estate, abstract books, and other records of the transfer of title to real estate, and to engage in the purchase and sale thereof."

Paragraph III (Record, p. 4) recites practically the same as the object and purpose of the Commonwealth Company. These allegations are admitted by the answer.

The undisputed testimony of the Foggs and Gove is that the business of an abstract company is to

manufacture and sell abstracts of title to real estate. That abstracts of title are frequently kept on hand, and under the testimony of Fred S. Fogg, (Record, pp. 124-125-126-128-132) they were bought and sold, and had a market value. That they were manufactured largely from the stock kept on hand. That they were a prime necessity in the sale of property, or the making of loans. The testimony of all the witnesses shows that an abstract is a manufactured product, and is sold over the counter, the price being based upon the number of transfers in such manufactured product. That a large amount of stock is kept on hand; that instruments effecting the title to real estate are kept in stock all the time so that all that the company has to do when an abstract is ordered is to take those instruments from its stock on hand. There are abstracts on the market. No loan of any appreciable amount, or the sale of any real estate of any appreciable amount could be made in Pierce County without an abstract of title being furnished by one of these companies. Regardless of where the information is obtained the abstract companies keep this information in books and records for that purpose.

(See testimony of Fred S. Fogg, Record, pp. 124-125-126-128-132, also Stipulations, Record, p. 133, that Horace Fogg, Franklin Fogg and Herbert Gove, if called as witnesses would testify upon direct and cross-examination as to the nature of the abstract business and

its methods of business to the same effect as the witness Fred S. Fogg.) To the same effect is testimony of J. H. Davis. (Record, p. 139.)

The Lower Court in passing upon this question in its opinion (Record, p. 172), uses the following language:

“An abstract of title is a written statement of the substance of those public records affecting the title to particular real property. As the evidence shows, such an abstract is the product of skill and labor upon material made effective by means of a “plant.” It is the written history of title to land. It may be preserved indefinitely and used in accomplishing the sale and transfer of such land. Abstracts in large cities, down to the point where acreage is platted into additions, are often printed by the hundreds from one copy, and kept in stock. Such a one becomes a commodity of value to many persons in the community not interested in the same parcels of land. The abstract is often used as a pledge or security for money borrowed. While it may be difficult to define the exact meaning of the word “commodity,” that it is a word of wide scope is shown by a speech of “The Bastard” in “King John.” Articles such as written abstracts of title, produced in the manner indicated, are clearly well within the confines of the word “com-

modity." Century Dict. Vol. 2, 1132; 8 Cyc. 339."

This finding of the Lower Court is not only sustained by the evidence in this case, but in conformity with the holdings of other courts on this question. It seems to us, however, that it needs no testimony to convince a court that in this day and age an abstract of title is a product or commodity, recognized as such in the market, and that no authorities need be cited on this proposition. We will, however, cite the Court to a few of the many cases that may be found holding that like instruments and business are commodities and dealing in the same.

The writing and selling of insurance is a commodity.

Beachley vs. Mulville, 70 N. W. 107-109.

In the last case cited defendants contended that the statute of Iowa, which is very similar to the above constitutional provision, had no application to insurance companies. The Court in holding that it did used the following language:

"However, that may be, we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject-matter, as well as to persons, both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or

article whatever. Insurance is a commodity. "Commodity" is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the word as "convenience, privilege, profit, gain; popularly, goods, wares, merchandise." We see no reason why, in the act, the words should be restricted to its popular use. It is common to speak of "selling insurance." It is a term used in insurance business, and law writers have, to quite an extent adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law. The district court instructed the jury that the combination was prohibited by the act in question, and we think the holding was right."

Telephone service is a commodity.

McKinley Telephone Co. vs. Cumberland,
140 N. W. 39.

*Home Telephone Co. vs. Granby & Neosho
Telephone Co.*, 126 S. W. 773.

The product of a court stenographer is a commodity and comes within the inhibition of this constitutional provision.

Moore vs. Bennett, 29 N. E. 388.

See *State vs. Duluth Board of Trade*, 121 N. W. 413.

In which that Court in discussing the *Moore vs. Bennett* case used the following language:

"*More vs. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216, seems to support the contention that a combination to fix the rate to be charged for personal services is illegal. The case grew out of an attempt of the law stenographers of the city of Chicago to fix the prices at which they would work. It is criticized in *Queen Ins. Co. vs. State*, supra, and the cases cited by the Court do not seem to be applicable upon the facts. As a matter of fact, such stenographers furnish more than their personal services, and the compensation is measured by the quantity of the product of their labors. Thus, in the ordinary case of a court stenographer, who furnished a transcript of evidence, the party ordering it pays for what he receives at a fixed price per folio. The proposition under consideration in *More vs. Bennett* did not include ordinary stenographers who work by the day or month, and it cannot be that such persons cannot combine and co-operate for the purpose of fixing or raising their wages, while workmen generally are permitted to do the same thing, with the approval of the law." (Italics ours.)

The testimony in the case at bar is undisputed that the price at which an abstract is sold by the abstract company is so much per instrument, regardless of personal service, time or labor expended thereon.

People vs. Federal Ser. Co., 99 N. E. 668.

COMMODITY.

“ * * * In its secondary and commercial sense that which affords advantage or profit; that which affords convenience or advantage, especially in commerce, including everything moveable which is bought and sold; an article of trade or commerce, a moveable article of value, something that is bought and sold; any moveable and tangible thing that is ordinarily produced or used as a subject of barter or sale; anything moveable that is subject of trade or acquisition; articles of trade or commerce; goods, wares and merchandise of any kind; property; something produced for use, and an article of trade or commerce.”

8 *Cyc.* 339.

“3. That which is useful; anything that is useful, serviceable or convenient; particularly an article of merchandise; anything moveable that is a subject of trade or of acquisition.”

Century Dictionary, Vol. 2, 1132.

The case of *Queen Insurance Co. vs. State*, 34 S. W. 397, which holding under a criminal statute, that insurance is not a commodity, does however contain statements applicable to an abstract and abstract business, to-wit:

"The word is ordinarily used in the commercial sense of any moveable or tangible thing that is ordinarily produced or used as the subject of barter or sale. * * * A commodity is something that may be manufactured, made, transported and sold. * * *"

"(Sec. 1.) An abstract of title is a short and methodical summary of the documents and facts which affect the title to a piece of land."

I. C. J. 365, Abstracts.

"The defendant is a corporation, the business of which, as indicated by its corporate name, is to furnish abstracts of title to real estate for a consideration paid by parties ordering the same, to be in all respects accurate and reliable."

Glawatz vs. Peoples Guaranty Search Co.,
63 N. Y. S. 691.

"The defendant Title Trust Co. is a corporation engaged in the business of preparing, certifying and selling abstracts of title."

Bremerton Development Co. vs. Title Trust Co., 67 Wash. 269.

Personal services and labor are held in numerous decisions not to be product or commodities, but an abstract company does more than furnish personal service, it gives a manufactured product, and the dealing in the manufactured product is dealing in a

commodity, and any combination between abstract companies to limit the production of such product is clearly contrary to this constitutional provision. Much of this manufactured product is made up from stock on hand.

This constitutional provision was discussed and upheld by the Supreme Court of this State in *Manson vs. Hunt*, 82 Wash. 291.

We respectfully represent to this Court that all of the agreements, notes and mortgages in evidence violate this constitutional provision. The original transactions of December 7th, 1909, created a complete monopoly in the hands of the individual defendants. The plaintiff, who in fact is Smith and Willoughby, were parties to and assisted in the creation of that monopoly; the same was true of all of the agreements of December 2nd, 1911. At that time the ostensible competition between Commonwealth Company and T. I. & I. Company of Tacoma was terminated. The abstract plant of the T. I. & I. Company of Tacoma was boxed up and placed in a vault in Portland, and put out of business in Pierce County, and the Commonwealth Company succeeded to practically all of its abstract business, and was thus able to get into its hands about ninety per cent of the abstract business. Smith and Willoughby were parties to and assisted in the accomplishment of this end.

The object and effect of the agreements both of December 7th, 1909, and December 2nd, 1911, were

to control the price of abstracts, and to control the production of abstracts through the means of this monopoly. Smith and Willoughby, the real plaintiffs, were parties to and participated in all of these transactions. The agreements therefore were illegal and non-enforceable, including the guaranty agreement of the Commonwealth Company of December 2nd, 1911, and the mortgage given to secure the same, and the agreement therein contained of the individual defendants to the effect that the Commonwealth agreement was legal being illegal and void, the Court will not enforce any part of any of the agreements.

As before stated, the monopoly created in 1909 was complete and absolute; the monopoly obtained by the contracts of 1911 while only to the extent of ninety per cent of the business, comes within the inhibition of the constitutional provision above quoted.

"Elements of Monopolization—1. Degree of Monopolization Requisite. The general rule seems to be that the scheme in question must have direct effect in bringing about conditions of monopoly. Complete monopoly is not essential; but some degree of monopolization is requisite."

27 Cyc. 898.

"It is undoubtedly true, under the law as it stands, that trade and commerce are 'Monop-

olized' within the meaning of the Federal Statute, when as a result of efforts to that end, such power is obtained that a few persons acting together can control the price of a commodity moving in interstate commerce. It is not necessary that the power thus obtained be exercised. Its existence is sufficient."

U. S. vs. Patten, 187 Fed 672.

CONTENTION OF APPELLANT CONCERN- ING THIS CONSTITUTIONAL PROVISION .

Appellant claims that this constitutional provision does not apply to transactions involved in this action, for the reasons,

First. That an abstract of title is not a product or commodity, and therefore not subject to monopolization under this constitutional provision.

Second. That under the statutes of the State of Washington concerning the duties of the Auditor there can be no monopolization of the abstract business.

Third. That by its terms this provision of the constitution is not self-executing, and that the legislature of the State of Washington has enacted no law giving force to the terms of this provision.

We will briefly discuss these contentions of appellant.

We maintain,

First. What we have said regarding the character of an abstract, and the abstract business, it seems to us, completely disposes of the first contention. Bear in mind at all times that we do not claim that mere personal service can be the subject of a monopoly, but we insist that under the evidence and the authorities that an abstract is more than the rendering of mere personal service. It is a manufactured product or commodity in the fullest sense of the word.

Appellant in support of its contention on page 2 of its brief, uses the following language:

“The charge for these abstracts is based upon the number of instruments abstracted, the established price being one dollar per instrument. For the convenient and prompt preparation of abstracts, persons in the business are accustomed to keep on hand a number of copies of instruments in frequent demand which are known as ‘stock’; and by taking from ‘stock’ the copies needed and adding thereto copies of particular instruments not kept in stock, abstracts are completed.”

This sustains our theory. The One Dollar is not paid for personal service, but it is paid for the stock, overhead charges of the plant, salaries of employees, just the same as the cost of a manufactured article, like a can of tobacco is made up of the overhead charges, salary of employees and stock.

Appellant on page 12 of its brief uses the following language:

"The certificate is a matter between the abstractor and his patron, creates no privity of contract in third persons, gives rise to no cause of action except between the abstractor and his patron, and therefore adds nothing of general value to the abstract as a commodity."

And draws the conclusion from the above that "the business is one of mere personal service and occupation," and argues from this that an abstract of title is not a product or commodity. This reasoning is fallacious.

Concede for the sake of an argument that if an abstractor should make an error in the abstract, and his certificate thereto, that there would be no cause of action against the abstractor by any third person into whose hands the abstract might come. This does not show, or tend to show, that the abstract is not a product or commodity.

The character of the warranty or guaranty of a thing sold does not determine the physical character of the thing itself. A manufacturer might give a personal guaranty to a purchaser of a can of tobacco, but whether or not third parties could sue on that guaranty does not determine the physical character of the can of tobacco, and change the transaction from one of the sale of the product or commodity into that of personal service.

The authorities cited by appellant on pages 12 to 19 of its brief are not in point, for the reason they are cases involving the character of the liability on an abstractor's certificate, and the other cases cited on those pages are cases of pure personal service.

Indeed, the case of *Heinsen vs. Lamb*, 117 Ill. 549 (7 N. E. 75), cited by appellant sustains our theory that the abstract business is not a business of personal service. The Court uses this language:

"Data collected from records do not constitute the abstract, but only the materials out of which the abstracts are constructed."

And the case of *Baker vs. Caldwell*, 3 Minn. 94, cited by appellant, holds that a set of abstracts and books of indexes containing complete abstracts of title to all of the lands in a certain county, prepared at great cost, labor and skill of a person, are proper objects of protection by copyright.

It seems to us that there is no escaping the conclusion that an abstract of title in this day and age is a tangible and definite commodity, and is the product of the abstract company's labor, brain, plant and stock, and there are the same reasons for protecting the public against the monopolization of the abstract business as there is in protecting it against monopolization of any other useful product or commodity.

Beechley vs. Mulville, supra.

Second: Appellant lays great stress on pages 19 to 22 of its brief upon the provisions of the laws of the State of Washington, contained in Remington & Ballinger's Code, Section 8792, and argues from that it is compulsory upon the Auditor to furnish abstracts of title upon the request of any one paying a fee therefor, and for this reason no monopolization of the abstract business could be formed by a corporation engaged in that business.

The provision of the Washintgon statutes are set forth in full on pages 20 and 21 of appellant's brief.

This theory was exploded by the Supreme Court of this State in the case of *Dirke vs. Collin*, 37 Wash. 620, in which the Court in referring to these sections of the Code, says:

"We think the sections above quoted were not intended to make the county auditors public abstractors, to the extent of requiring them to make a complete list of all liens and all transfers affecting particular pieces of land upon demand therefor, but, rather, were intended to require the auditor to search for certain instruments to which his attention is specifically directed by the applicant, and, if such instruments are recorded or filed in his office, to certify as provided in section 417."

(R. & B. Code, Sec. 8792.)

It is conceded that the auditor does not keep tract indices, and it is also shown by the evidence

that it would be practically impossible for the Auditor to compile abstracts without such indices.

It is also shown by the evidence that under the present conditions the only way an auditor could procure an abstract would be to get it from an abstract company. The Auditor would have to examine all of the records of his and other offices. He has authority to examine other county offices, but no authority to examine the City, or the United States offices, and would certify only to what appeared of record in his own office. It is the general practice to obtain abstracts from the abstract companies, and has been for years.

(See testimony J. L. Wadsworth, Record, p. 138.)

(See testimony James H. Davis, Record, p. 139).

(See testimony C. A. Campbell, Record, p. 140).

(See testimony W. A. Stewart, Record, p. 140).

All of the above mentioned witnesses were either County Auditors, or Deputy County Auditors from the year 1908, down to the time of the trial of this action.

It is further claimed by appellant on page 11 of its brief, as follows:

“Indeed anyone may go into the abstract business at any time. The official records are open to him. If he chooses he may indirectly compel others in the business to give him necessary information.”

It is true that the official records are open to everyone, but as Mr. Horace Fogg testified (Record, p. 122), "anyone could examine the record, but would not know whether he had all of the instruments that the County Auditor had or not. There are no indexes by which he could know whether the recorded instruments effected a given title.

Mr. Fred S. Fogg also testified (Record, p. 127), "that the reason a purchaser or mortgagee of real estate would not accept an Auditor's abstract of title was that an auditor did not have the means to prepare an abstract on which people could rely. It is a physical impossibility for the Auditor to make a reliable abstract."

There is scarcely any business that anyone may not go into at any time, but that is no argument that there may not be formed an unlawful monopoly of such business, or acts may not be done which would make an unlawful restraint of trade or competition.

The testimony in this case shows (Testimony Fred S. Fogg, p. 127), an abstract company cannot begin to transact business from the day it opens its office, and produce accurate abstracts, although in some instances the public will accept them. Indeed, the testimony shows that a considerable amount of money would have to be invested in a plant before the company would be prepared to do business, and the Court recognizes this in the portion of his opinion hereinbefore quoted.

This, it seems to us, successfully disposes of the argument of appellant on these two propositions.

Third: It is claimed in appellant's brief, at page 54, under the authority of *Northwestern Warehouse Company vs. Oregon Railway & Navigation Co.*, 32 Wash. 218, that these provisions are not self-executing, and therefore that trading corporations not engaged in public service (and aside from those in the commission business, and associations not formed for profit), are not subject to any legislative or constitutional restrictions of their power to contract in this respect, and that monopolies can thrive and flourish in this State, a thing which is condemned not only by the constitution of this State, but by the constitution or laws of nearly every State in the Union. It seems to us that this proposition cannot be upheld.

The section of the constitution above referred to says, "*monopolies and trusts shall never be allowed in this State,*" and prohibits further the formation of any combination, which shall directly or indirectly combine for the purpose in any manner whatever of fixing the price or limiting the production, or regulating the transportation of any product or commodity. It then provides that the legislature shall pass laws for the enforcement of this section by adequate penalties. We concede that before any penalties can be imposed on any corporation for the violation of this section of the constitution, the legislature shall pass

a law to that effect, but that is all that is not self-executing. The constitution of the State prohibits monopolies.

The Northwestern Company case cited above was an application for a writ of mandamus directed to the railroad company commanding it to give respondents, the Warehouse Company, track connections with its railway line at the City of Pomeroy, in Washington, in such manner as to furnish respondents the same shipping facilities claimed to be now furnished to other warehousemen and shippers at said city.

It was claimed by the railway company that the constitutional provision provided for no *affirmative relief*, and that none could be given by the Court until the legislature had passed an appropriate act, this contention was sustained by the Supreme Court. It was not claimed by the railroad company, nor was it held by the court, that this constitutional provision was not self-executing, *in so far as it prohibited the doing of the acts which are thereby rendered illegal and unlawful*. That this was the contenton of the railway company is shown by their briefs in the case, from which we quote:

“THE CONSTITUTIONAL PROVISIONS
FURNISH NO GROUND FOR THE RE-
LIEF SOUGHT IN THIS PROCEEDING:

In a sense it may be true that the constitutional provisions referred to are self-executing

insofar as they prohibit the doing of acts which thereby are unlawful, but no remedy is provided in the Constitution for the enforcement of these provisions. At most, an action at law, for damages to any person injured by reason of the acts done contrary to the Constitution would be the remedy to which the person injured would be entitled. In addition to this the Constitutional Convention, in their wisdom, saw fit to add the additional requirement that the Legislature should prescribe adequate penalties for the violation of Section 22.

We contend (1) that no positive right is created by the negative provision of these sections of the Constitution; and (2) that even though a positive right be created by these provisions no means is provided for its enforcement."

Brief of appellant, *Oregon Ry. & Navigation Co.*, p. 148.

And on page 150:

"Apply this test to these sections of the Constitution. Do they create any positive rights? Do they furnish any ground for the resort to a special proceeding of this character, or any ground for the issuance of the prerogative writ of mandamus for the purpose of compelling a positive act on the part of a common carrier? On the contrary, all of Sec-

tion 22 and the only portions of Section 15 which can apply here simply forbid the doing of certain acts; *and undoubtedly, acts done in violation of them, combinations or contracts made for the purpose of fixing the price or regulating the transportation of commodities, are void*, discrimination in charges or facilities for transportation between places or persons give rise to a common law right of action for damages in favor of the persons injured. But further legislation is needed before the rights here claimed are capable of enforcement by mandamus."

"It is our contention that the Constitution of Washington is not self-executing, except insofar as its provisions are purely negative and prohibit the doing of certain acts which are thereby rendered unlawful. The acts are all affirmative in their nature, such as combinations for the purpose of fixing the price, limiting the production or regulating the transportation of any product or commodity. The provisions of the Constitution are general in their terms, and are intended to cover all cases."

Reply brief of Appellant, p. 25.

By consent of Counsel these briefs are filed with this Court and may be considered by it.

The question as to whether or not the acts prohibited in this provision were self-executing was

not involved in this case. The Court simply decided that no *affirmative* relief could be granted under this provision until the legislature had passed an act granting such relief. That this was the true effect intended by that decision is borne out by the decision of this Court in the case of *Manson vs. Hunt*, 82 Washington 291, in which it is held:

“A contract between two steamship companies operating boats between the same points, whereby one, on consideration of \$1,500, agreed to withdraw its boats from the route for a period of three years, contravenes Const., Art. 12, Section 22, prohibiting monopolies and providing that no incorporated company shall directly or indirectly combine or make any contract with another for the purpose of fixing the price, or limiting the production, or regulating the transportation of any product or commodity.

“A note based upon a contract, knowingly made in restraint of trade, which so recited and showed that the note was part of the contract, is void as against public policy, and will not be enforced by the courts.”

The Court further in the opinion says on page 294:

“We are satisfied that our constitution in

the section quoted prohibits contracts which provide for monopolies regulating the transportation of any product or commodity. It is conceded in this case that these two companies were public carriers, carrying passengers and freight between the points named. The contract in question was clearly a contract in violation of this provision of the constitution, because it in effect provided that the Vashon Navigation Company should have a monopoly of the business between these points."

It will be noted that the Supreme Court of this State decided this case solely and alone upon the constitutional provision, and held that the prohibitive parts of that constitutional provision were self-executing, and did not find it necessary in the decision of the case to refer to any statute whatever. It is a general principle that prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is illegal.

In our opinion the case of *Manson vs. Hunt*, above cited, sustains our position, that is, that the various contracts entered into, as shown by the evidence, tended to and did form a monopoly, and therefore under both the common law and the constitutional provision above cited, are illegal and cannot be enforced. No affirmative relief is being asked. We simply lay the situation before the Court, and maintain that all of these acts are prohibited in

no uncertain language by the highest law in the State, i. e., the constitution, and for that reason the Court can grant neither party any relief, but must leave the parties where it finds them.

If appellant's contention is correct in regard to this, this constitutional provision is meaningless. It cannot be successfully maintained that contracts or transactions which have for their purpose, or tend to create monopolies can be enforced. The only thing the framers of the constitution left was for the legislature to pass acts providing for the exercise of affirmative rights and providing penalties for the violation of this constitutional provision.

It cannot be contended that contracts which tend to the formation of a monopoly are not prohibited by the constitution, and are illegal. As is said in 6 Ruling Case Law, Section 105, p. 699:

"Perhaps the plainest example of an illegal contract is one which violates the provisions of a statute. Clearly the courts cannot recognize as valid a contract founded upon an act which is absolutely forbidden by the law-making department of the government. Broadly speaking, then, there can be no doubt that a contract is illegal if it violates a constitutional statute or if it cannot be performed without the violation of such a statute."

This position was sustained by the Court below in the following language:

“In so far as the prohibition of this section is concerned it is self-executing, though legislative action may be necessary to provide penalties for its enforcement, or to authorize recovery on account of its violation. *Manson vs. Hunt*, 82 Wash. 291. In this case it will not be necessary to consider what, if any, changes this constitutional provision made in the common law as to monopoly and restraint of trade and competition. The use of the words, “any product or commodity” relieves the court from the consideration of the question as to how necessary or useful a product or commodity an abstract of title is.” (Record, p. 172.)

The case of *Long vs. Billings*, 7 Washington 267, is cited by appellant in its brief at page 56, as sustaining its position. The opinion in that case is in conformity with the opinion in the Northwestern case, *supra*. It simply holds that before any rights can be exercised under this constitutional provision that the legislature must prescribe the method in which the right can be exercised. We are asking for the exercise of no affirmative right in this case, but simply claiming that these various transactions are prohibited in no uncertain terms by the constitutional provision above quoted.

Appellant in its brief, at page 56, uses the following language concerning this constitutional provision:

“Standing alone, the phrase, ‘Monopolies and

trusts shall never be allowed in this state,' has no meaning and affords no rule by which even the most learned and intelligent can determine whether or not a proposed cause of action is legal or illegal. Unless it is defined by other parts of the constitution, it is inoperative until the legislature has given to it a definite meaning."

We contend that the expression, "monopolies and trusts shall never be allowed in this state," is a solemn declaration of a rule of conduct that must be maintained by all business carried on in the state, and under the authority of *Irwin vs. Rogers*, 91 Washington 287, unless the words "monopolies and trust" are defined in other parts of the constitution, or the laws of the State of Washington, they will take the definition given them by the common law, and as we have shown in the former part of our brief, transactions such as those involved in this case are prohibited by the common law, therefore we maintain these transactions are prohibited by both the common law and the Constitution of the State of Washington.

It is claimed by appellant on page 57 of its brief, that the contracts in suit did not have for their purpose, and did not in fact fix the price, nor limit the production of anything. That is not the test. *The test is, did the contract put it in the power of the monopoly to fix the price and limit the commodity.* If it did it is in the inhibition of

this provision of the constitution, and as was said by the honorable district Judge, in his opinion in this case (Record, p. 176) :

“It was well understood that complete control, that is, monopoly, of the abstract business was to be acquired by securing both the independent plants, with the incidental power to fix and control prices and output.”

U. S. vs. Patton, 187 Fed. 672.

(C) *Agreement of Guaranty of Commonwealth Company of December 2nd, 1911, and the Mortgage Securing the Same Illegal and Non-Enforceable Under the Constitution of the State of Washington.*

I.

Article XII, Section 6, of the Constitution of the State of Washington provides:

“Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a genral law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously

given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void."

It must be conceded in this case that the corporation Commonwealth Company received no money or property, nor was any labor done for it in consideration of the execution of the guaranty in writing attached to the complaint marked "Exhibit B" (Record, p. 25), or for the execution of the real estate mortgage attached to the complaint marked "Exhibit C" (Record, p. 30), and consequently no recovery can be had against the Commonwealth Company on either of those instruments.

The plain purpose of this constitutional provision is to prevent the issuance of corporate bonds, or the corporation entering into any other obligation for the payment of money, unless the corporation actually receives money or property, or has labor actually done for it in return at the time it executes such obligation; in other words, the obligations entered into by a corporation must be balanced by a corresponding increase in the corporation's assets.

Generally speaking a contract is binding if the promisee parts with value, although the promisor receive nothing, but we submit that this constitutional provision alters the general rule and looks solely to what is received by the corporation in exchange for its obligations; rather than what the one taking them parts with. The suppression of

the competition of the T. I. & I. Company, and thereby giving the Commonwealth Company a monopoly was neither a legal consideration, nor was it such a consideration as this constitutional provision expressly provides that a corporation must receive. If this is not true, then the constitutional provision means nothing, and the law remains the same as though there was no such provision.

The constitution of the State of New York contains a provision not so far reaching as the provision in the constitution of the State of Washington. The New York provision is as follows:

“No corporation shall issue either stock or bonds, except for money, labor done, or property actually received for the use and lawful purpose of such corporation.”

Section 55, *New York Corporation Law*.
Consolidated Laws c. 59.

The Circuit Court of Appeals of the Second Circuit in a case decided January 11, 1916, had under consideration this constitutional provision of New York and held:

“1. CORPORATIONS — MAKING AND ISSUANCE OF BONDS — CONSIDERATION. Under Stock Corporation Law N. Y. (Consol. Laws c. 59) Sec. 55 providing that no corporation shall issue either stock or bonds, except for money, labor done, or property

actually received for the use and lawful purpose of the corporation, bonds of a corporation could not be pledged to secure payment of a pre-existing debt, and an extension of the time for payment of the debt, or the surrender of the corporation's old note and the substitution therefor of a new note, with the same or different endorsers, did not satisfy the statute."

In re *Progressive Wall Paper Corp.*, 229
Fed. 489 and cases therein cited.

The Circuit Court of Appeals of the Ninth District had under consideration this constitutional provision of the State of Washington, and in a decision handed down November 1, 1915, used the following language:

"In respect to the \$25,000.00 of the bonds so issued and delivered to the bank, we have no difficulty in agreeing with the court below that they were issued without authority, and are void; that the purported resolution of March 20, 1911, was invalid; and that those bonds were issued contrary to that provision of the Constitution of the State of Washington (Section 6 of Article 12) prohibiting any corporation of the state from issuing 'any bond or other obligation for the payment of money, except for money or property received or labor done,' and contrary to the provisions of the trust deed itself."

Chavelle vs. Washington Trust Co., 226 Fed. 400-408.

Mayfield W. & L. Co. vs. Graves Co., etc., 185 S. W. 485.

Pac. Ct. Pipe Co. vs. Conrad, etc., 237 Fed. 673.

Lyon vs. Dakota Plow, etc. Co., 240 Fed. 405.

Bonds of a corporation pledged to secure antecedent indebtedness held void in

Farmers Loan & Trust Co. vs. San Diego Street Car Co., 45 Fed. 518-528.

A constitutional provision of Missouri is to the same effect. Bonds of a corporation of Missouri issued to secure an antecedent debt with no new consideration, except an extension of that debt are void by virtue of such constitutional provision.

Mudge vs. Black et al., 224 Fed. 919-921.

Kemmerer vs. St. Louis Blast Furnace Co., 212 Fed. 63-65-69 and cases cited.

Memphis & Little Rock Ry. Co. vs. Robert K. Dow, 120 U. S. 287 (30 L. Ed. 595).

While in the above case the bonds were upheld, the Court at page 303 (L. Ed. p. 600), sustains the above proposition.

APPELLANT'S CONTENTION THAT THE CONTRACT OF GUARANTY AND MORTGAGE SECURING SAME ARE NOT WITHIN THE

INHIBITION OF THIS PROVISION OF THE CONSTITUTION OF THE STATE OF WASH- INGTON.

I.

Appellant contends on pages 71, 72 and 73 of its brief, that the stockholders of the T. I. & I. Company of Tacoma and the Commonwealth Company being practically the same, and therefore that all of these transactions were transactions of the Commonwealth Company, and therefore the Commonwealth Company received the consideration such as provided for in this provision, and the organization of the T. I. & I. Company of Tacoma was but a cloak to protect the Commonwealth Company.

There can be nothing in this contention under the record in this case. It is true that the stockholders of the Commonwealth Company and the T. I. & I. Company of Tacoma were practically the same, but in none of the transactions did the Commonwealth Company become liable, nor did it intend to become liable, and it was the purpose not only of Smith and Willoughby, the real appellants, but all the other parties, that the Commonwealth Company should not be liable in the 1909 transactions.

The first that the Commonwealth Company appeared in these transactions was the execution of the guaranty agreement, and the mortgage securing the same, in December, 1911, which we

have shown were within the inhibition of the constitutional provision above quoted.

Appellant in its brief, page 85, uses the following language:

“While at law the theory of legal corporate entities may control, equity will always go behind it to seek out the real parties and the real interests and will never permit the fiction to accomplish a wrong or bring about injustice.”

We make no issue with appellant on this proposition of law. It is not in point in this case, neither are the authorities cited in appellant’s brief in point.

Appellant cites the case of *Spokane Merchants’ Association vs. Clere Clothing Co.*, 84 Washington 616, in which the Court held:

“Courts no longer hesitate to look through form and substance and ignore a mere colorable corporate entity, to the end that rights of third parties may be protected.”

There is no question of protecting third parties in this case, and we cannot answer appellant’s argument in this connection in a better way than by quoting from the opinion of the Lower Court in this case:

“The fact that the stockholders of the T. I. & I. Company of Tacoma, and the Commonwealth Company, though not entirely identical,

yet were practically controlled by the same interests, has been considered. Doubtless the Court would, under certain circumstances, look through the cloak of one corporation to the body of another to prevent the consummation of a fraudulent enterprise, but this is not such a case. Mr. Willoughby, the manager of the T. I. & I. Company of Washington, himself helped to organize the T. I. & I. Company of Tacoma, which was to, and did, immediately take over the property in question. He subscribed for 48 of its 50 shares of capital stock. While it was to take over properties valued at \$100,000.00, its capital stock was placed at \$5,000.00, showing a purpose to minimize the liability on the part of those responsible for the corporation. Whether the T. I. & I. Company of Tacoma was created in order that the goodwill and advantage of a going concern might be continued to better the security which the selling company held upon the plant and business, or whether it was created to help deceive the public in the idea that there was real competition in the abstract business, when there was none, or whether it was created for both these purposes, which latter seems the more plausible under the evidence, no assistance is afforded the plaintiff in its contention, for thereby the real plaintiffs helped to create this new corporation, whatever its purpose, and equity is not called upon to strip from the body

of the Commonwealth Company the cloak in which it is alleged to be hidden, for the advantage to those who fashioned the cloak suitable to, and probably in part intended for, that purpose. The fact that Willoughby was indemnified by the Foggs for his subscription to the capital stock of the T. I. & I. Company of Tacoma, shows that he was acting for and with them. Having knowingly elected to deal in this manner, equity is not now called upon to reform the transaction more to their present liking."

(Record, pp. 166-167).

This question is settled by the Federal Court in the case of *Pittsburg & Buffalo Co. vs. Duncan et al.*, 232 Fed. 584, in which the Circuit Court of Appeals of the Sixth Circuit held as follows:

"The mere fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one binding upon the other, where each corporation is separately organized under a distinct charter."

"A corporation *held* not liable on contracts of other corporations in which it owned no stock, where its business was separately conducted and the stockholders were not all the

same, although the same persons owned a controlling interest in each."

II.

It is next contended by appellant under the rule of *ejusdem generis* that this provision applies only to bonds and obligations like bonds, and they claim that it has been universally so held in other states. It is true that the reported cases are cases where the facts under consideration involved issues of bonds, but, it is also true that the constitutional provision or statute in few of the States contains the same provisions as the constitutional provision of this State. Only two of them contain the words, "or other obligation for the payment of money."

It seems to be the idea of the appellant that this constitutional provision was intended as a sort of "Blue Sky Law," for the protection of the public in buying stocks and bonds in the market, but we submit that it was intended for no such purpose; that it was intended for the protection of creditors and the owners of the corporation that its assets might not be dissipated away by entering into corporate obligations without the corporation's assets being correspondingly increased thereby.

The purpose of the similar provisions in other statutes and constitutions may be seen from the following quotations from recent decisions in the Federal Court:

“It must be assumed that the legislature, by this carefully worded provision, intended to safeguard the rights of creditors and stockholders, and to insure that whatever indebtedness was incurred by the issuance of bonds should inure to the benefit of the corporation.”

In re *Waterloo Organ Co.*, 134 Fed. 341.
(In re N. Y. Stat.)

“The object of the statute is to protect stockholders and bona fide creditors from the improvident issue of its bonds by the corporation, which might, and if allowed, probably would, result in wrecking the corporation * * * ”

Pfister vs. Milw. Elec. Ry. Co., 53 N. W. 27
(Wis.)

Quoted with approval in *Kemmerer vs. St. Louis Blast Furnace Co., et al.*, 212 Fed. 63.

“The object of the enacting bodies was to prevent the issue by a corporation of any stock or bonds unless the corporation received instead of them an amount of value equal to the par value thereof, and this to the end that the amount of stock and bonds of a corporation should not misrepresent and deceive those who dealt with it regarding the value of its assets. Now in these cases the corporation received no money, no labor, or property, no increase of its assets, for, or instead of the bonds it pledged

for its old debts. In each case it had the same amount of assets the moment before it made the pledge that it had afterward."

Kemmerer vs. St. Louis Blast Furnace Co., et al., 212 Fed. 63 (Mo. Stat).

"The purpose of the statute is the protection of the stockholders and the creditors against an indebtedness created by the issuance of bonds for which the corporation does not at the time receive either money, labor or property. The bank must be assumed to have known that the law of the state expressly forbade the corporation from issuing bonds unless for money, labor or property actually received. It also knew that it was receiving the bonds without giving the corporation either money, labor or property. It took the bonds with notice of this infirmity in its title, and is not therefore a bona fide holder."

In re *Progressive Wall Paper Co.*, 229 Fed. 489 (N. Y. Stat.).

Under an attempted application of the rule of *ejusdem generis*, plaintiffs contend that the constitutional provision is limited to bonds and obligations like bonds. The rule of *ejusdem generis* is not applicable. It is an established rule of construction that, particularly in the construction of constitutional provisions, effect must be given to all consistent provisions. The constitutional provision

under discussion provides "nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done * * * All fictitious increase of stock or indebtedness shall be void." The last sentence is a declaration of the intent and purpose of the prior part of the provision. The prohibition against fictitious indebtedness is general, and is not limited to indebtedness created or evidenced by bonds or obligations like bonds. As bonds and obligations like bonds constitute only one form that may be used to evidence an "indebtedness" full effect cannot be given to the word "indebtedness" by limiting it to indebtedness evidenced by bonds or obligations like bonds.

It is apparent that the Constitutional provision was intended to strike at the creation of fictitious indebtedness as a substantial thing, and not merely at the *form* by which that indebtedness might be evidenced, for the evils of fictitious indebtedness would be the same whatever the form of the obligation evidencing it. For example, while it is conceded that a corporation cannot issue its own bonds, except for money or property received or labor done, yet under the theory of the appellant it would be perfectly permissible for a corporation to guarantee an issue of bonds of another corporation, and give a mortgage on its corporate assets as security for its guaranty, without the guaranteeing corporation receiving a single thing of value therefor. Is it possible that the Commonwealth Company,

while it could not so issue its own bonds, could guarantee the notes or bonds of the T. I. & I. Company of Tacoma, without receiving a single thing of value therefor, and that while the former would not be binding on the Commonwealth Company that the latter would? If that is so it would furnish an easy evasion of the law.

In prohibiting the creation of fictitious indebtedness, the constitution apparently meant to lay down the rule that the indebtedness of a corporation would be fictitious unless the indebtedness was created "for money or property received or labor done."

If attention be paid to the broad general declaration of the constitution, that all fictitious indebtedness, i. e., indebtedness for which the corporation has not received money or property or labor—shall be void, it at once becomes apparent that the important word in the sentence "bond or other obligation for the payment of money" is not the word "bond" but is the word "obligation" with the qualification or *test of similarity* that it must be an obligation "for the payment of money." The constitutional provision was not intended to be limited to the particular *form* of obligations called bonds—for the substantial evil struck at was much broader—nor was the provision intended to be applied to obligations for anything other than "the payment of money."

This rule was laid down in *Weiss vs. Swift & Co.*, 36 Pa. Super. Ct. 276, quoted with approval and

applied in *Kansas City Southern Ry. vs. Wallace*, 132 Pac. 908, 46 L. R. A. (N. S.) 112, in the following language:

"In the case of *Weiss vs. Swift & Co.*, 36 Pa. Super. Ct. 276, was one wherein the act in question read as follows: 'In every sale of green, salted, pickled, or smoked meats, lard and other articles of merchandise, used wholly or in part for food,' etc. The question before the court was whether "eggs" were included within the act. In holding that they were, in its discussion the court said: "If the words were 'every sale of green, salted, pickled or smoked meats, lard and other articles of merchandise,' without more to indicate the subjects of sale intended to be covered, there would be propriety in applying the general principles of construction that when certain things are enumerated, and then a phrase is used which might be construed to include other things, it is generally confined to things *ejusdem generis*. * * * But in applying this principle of construction, and in determining what things are *ejusdem generis*, regard must be had to the general subject to which the act relates. Things which plainly belong to the same class when considered with reference to another subject. The rule would be absurd if under the head 'other' nothing can be included in the construction of the act which is

not exactly the same in every particular as the thing specified. * * * Moreover, it has been held upon sound reason that, when the particular word or words exhaust a whole genus, the general term will not be regarded as surplusage, but will be construed to refer to a larger class. This must be so, if regard be had to the rule, which is more imperative than the rule *ejusdem generis*, that a statute is to be considered as a whole, so that, if possible, effect will be given to every part of it. Here the subject to which the act relates, as shown by the body of it, as well as by its title, is the sale of provisions by description; and, considering the specific words "meats" and "lard" as furnishing a sample of the kind of provisions referred to, the words "other articles of merchandise" upon the proper application of the rule *ejusdem generis*, would be confined to such provisions as are 'used wholly or in part for food,' and this would include eggs. We take it, therefore, that if the last quoted words had not been added in the statute, the words 'other articles of merchandise' would have included eggs, because, having regard to the subject of legislation, they are of the same kind of things that are specially mentioned. *At any rate, by adding the words, 'used wholly or in part for food,' the legislature set up the standard of similarity to the things specifically mentioned to which the other articles of merchandise must*

conform; and no principle of construction requires to impose any other test, except that the articles of merchandise come up to this standard and, in addition, be such as are comprehended within the term 'provisions,' as that term is commonly understood when used in such connection as this."

"The doctrine of *ejusdem generis*, however, is only a rule of construction, to be applied in ascertaining legislative intent, and does not control where it clearly appears from the statute as a whole that no such a limitation was intended. Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from specific words or be meaningless."

36 Cyc. 1121-2.

In the case of *State ex. rel. Improvement Co. vs. Bridges*, 19 Wash. 431, the statute authorized extensions of all contracts issued by the State "to purchasers of school or other lands," upon payment of delinquent and accruing interest, and the court was asked to restrain the commissioner of public lands from cancelling on the public records a certain contract between the State of Washington and the petitioner for the purchase of tide lands. It was contended that under the rule of *ejusdem*

generis the words "other lands" necessarily mean the same kind of lands as the kind expressed, viz., school lands, and that school lands being granted lands the provision "or other lands," must refer exclusively to other granted lands. The court held, however, that from investigation of the whole act they were of the conclusion that it was not the intention of the legislature to place the restriction contended for.

And in *State vs. Plastino*, 67 Wash. 375, where the Court said:

"The information was drawn under Sec. 2004, Rem. & Bal. Code, providing:

'In all cases where any child shall be a delinquent or neglected child, as defined by the statutes of this state, the parent or parents or persons having custody of such child, or any other person, responsible for, or by any act encouraging, causing or contributing to, the delinquency or neglect of such child, shall be fined * * * or imprisoned * * * '

"The court below applied the rule of *ejusdem generis* to the statute, and held that the words 'any other person' were controlled in their meaning by the specific enumeration of persons in the preceding clause, and for this reason only parents or other persons *in loco parentis* having custody of the child, could be informed against under this statute.

"We cannot concur in this ruling. The rule

of *ejusdem generis* is to be used with other rules not less important, such as the determination of the evident intent of the law-making body, and does not warrant the courts in confining the operation of the statute within narrower limits than was intended by the law-makers. In *re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105, it affords a mere suggestion to the judicial mind that, where it clearly appears that the legislature had in mind a particular class of persons or things, the words of general description were not intended to embrace any other than those within the class. Every legislative act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be gathered from the language of the act; and this rule, like every other rule, is to be made use of in ascertaining and giving effect to that meaning, rather than to hamper and restrict the evident intent of the law-making body.

Lewis Sutherland, Statutory Construction,
Sec. 437.

“The evident meaning and intent of this act is to protect delinquent children in the hands of all persons. It never was intended by the legislature that the language employed by it in framing the act should be so read as to furnish protection to these children from the sins of their parents or custodians, but permit other

persons to escape the consequences of their contribution to the delinquency of the child."

In the case of *Strange vs. Board of Commissioners*, 91 N. E. 242 (Indiana), the Court was asked to restrain the County Commissioners from letting a contract to pave a highway with brick, on the ground that the general highway act provided that highways should be paved "with stone, gravel or other road paving material," and that the rule of *ejusdem generis* must be applied, and that "other road paving material" means material of a similar kind to stone or gravel. The Court affirmed the judgment of the lower court in sustaining a demurrer to the complaint, saying:

"It is next urged that the rule of *ejusdem generis* should be applied, and that the phrase, 'other paving material' should be held to refer to the prior word, 'stone' or 'gravel,' and limit the material on country roads to stone or gravel or like material. The rule of *ejusdem generis* is not in and of itself a rule of interpretation, but an aid to interpretation, when the intention is not otherwise apparent. Black, *Interpretation of Laws*, pp. 143-145. It is a rule of application of the rule of *ejusdem generis* that when the prior or specific words exhaust the class or genera there is nothing for the remaining terms to qualify, and following the rule that all parts of a statute shall if possible be given effect, the general words are to

be given effect if that can be done, and that the rule shall not be invoked to restrict the operation of the act within narrower limits than the legislature intended. *United States, etc., vs. Cooper* (1909), 172 Ind.—, 88 N. E. 145-146. Black, *Interpretation of Laws*, pp. 145-146. Endlich, *Interpretation of Laws*, Sec. 409. Here the words 'stone' and 'gravel' entirely exhaust each class or genera, and unless the remaining words mean something else, they can mean nothing, which will not be imputed to them if avoidable, and we place our decision in this respect upon the ground that the phrase 'other paving material' necessarily means something other than either stone or gravel, and that the Legislature intended giving to the localities an opportunity to use such materials as were necessary, or best suited to the end to be attained. The rule of *ejusdem generis* that general words following a particular enumeration will not include things of a superior class has no application where the rule would leave the general words without meaning or effect. Sutherland, *Statutory Construction*, Sec. 436. This construction gives effect to the whole statute, and is also in harmony with the theory of using such material as may be suited to the particular needs in improving city or town streets or country roads, with proper limitations upon unnecessary or excessive cost by those most concerned."

In the case of *United States vs. Mescall*, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77, the Supreme Court had under consideration a Federal Statute providing for the forfeiture of goods or their value where "any owner, importer, consignee, agent or other person" shall make an entry by means of false or fraudulent practices or shall be guilty of any unlawful act or omission whereby the United States is deprived of the lawful duties and for the punishment of such person by fine or imprisonment or both. A customs employe was under indictment for making and returning false weights in connection with an entry of imported merchandise and it was contended that under the rules of *ejusdem generis* he was not in fact any of the persons within the contemplation of the statute. Mr. Justice Brewer, delivering the opinion of the Court, said:

"Counsel for defendant invokes what is sometimes known as Lord Tenderden's rule, —that, where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described,—*ejusdem generis*. The particular words of description, it is urged, are 'owner, importer, consignee, agent.' The general term is 'other person,' and should be read as referring to someone similar to those named, whereas the defendant was not owner, importer, consignee

or agent, or of like class with either. He was not making, or attempting to make, an entry. He represented the government, and contrary to his duties, was rendering assistance to the consignee, who was making the entry. But, as said in *National Bank vs. Ripley*, 161 Mo. 126, 132; 61 S. W. 587, 588, in reference to the rule:

“But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. * * * Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.’

“See also *Gillock vs. People*, 171 Ill. 307, 49 N. E. 712, and the cases cited in the opinion;

Winters vs. Duluth, 82 Minn. 127, 84 N. W. 788; *Matthews vs. Kimball*, 70 Ark. 451, 462, 66 S. W. 651; 69 S. W. 547. Now, the party who makes an entry, using the term 'entry' in its narrower sense, is the owner, importer, consignee, or agent; and it must be used in that sense to give any force to the argument of counsel for defendant; but, used in that sense, the term, 'other person' becomes surplusage. In Sec. 1 of Chap. 76, Laws of 1863 (12 Stat. at L. 738), is found a provision of like character to that in the first part of the section under which this indictment was found, but the language of the description there is 'owner, consignee, or agent.' This was changed by Section 12, Chap. 391, Laws 1874 (18 Stat. at L. 188) to read 'owner, importer, consignee, agent, or other person,' and that description has been continued in subsequent legislation. Evidently the addition in 1874 of the phrase 'other person' was intended to include persons having a different relation to the importation than the owner, importer, consignee or agent. Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee, or agent, or else the term 'other person' was a meaningless addition. Now the defendant was a person, other than the owner, importer, consignee, or agent, by whose

act the United States was deprived of a portion of its lawful duties. His act comes within the letter of the statute as well as within its purpose; and the intent of Congress in the legislation is the ultimate matter to be determined."

In this connection we wish to call the Court's attention again to the case of *Farmers' Loan & Trust Co. vs. San Diego Street Car Co.*, 45 Fed. 518, 528. In this case, part of the bonds in question were pledged for the company's own pre-existing indebtedness and part of them were pledged as collateral security for a debt, not of that company, but of the Coronado Beach Company. The San Diego Street Car Company thereby virtually put itself in the position of guaranteeing the debt of the Coronado Beach Company to the extent of those bonds. The court held these bonds to be invalid, and we believe that this case is a very close one on the questions involved herein.

Appellant cites and relies largely upon the case of *Memphis, etc. Ry. vs. Dow*, 120 U. S. 287 (30 L. Ed. 595). This case does not sustain appellant's contention.

It was a case decided on a constitutional provision of Arkansas, which prohibits corporations from issuing stocks or bonds, except for money actually received or labor done, and the court in that case simply held that when stock or bonds had been issued by a corporation based upon a present

consideration of money, property, or labor actually received, the corporation was not bound to receive *par* for the stock or bonds so long as they were issued for a legitimate corporate purpose, and were not a mere device to evade the law and accomplish that which was forbidden. But that case does hold that no corporation can issue stock or bonds, except for a present consideration moving to the corporation of labor, property or money, and upholds our contention in every particular.

Appellant, on page 73 of its brief, makes the following startling statement:

“In no reported case has an attempt been made to apply this, or any similar constitutional provision to restrict the power of the corporation to enter into contractual relations by which it obligates itself to pay a debt.”

This statement is not only not sustained by the authorities, but is contrary to all the authorities.

(See cases cited.)

And we challenge counsel to find one single adjudicated case where any State with a constitutional provision similar to ours a corporation has issued its stock, bonds, notes or other obligation for the payment of money, for either the payment or security of a pre-existing debt of the corporation, or as security for the payment of a debt of a third party wherein the same have been upheld.

The Honorable District Judge in his opinion in this case uses the following language concerning this contention of appellant:

“Plaintiff contends that under the *ejusdem generis* rule the words ‘or other obligations for payment of money’, following in the section of word ‘bond’, should be held to mean a bond-like obligation only. If it be asumed that the guaranty and mortgage are not bondlike obligations, yet, in view of the plainly apparent purpose of the provision to protect the creditors and stockholders of the corporation by forbidding its issuance of promises to pay money unless it receive on account thereof, money, property or labor, no necessity appears for invoking the rule of *ejusdem generis* as an aid to interpret this provision. *Kemmerer vs. St. Louis Blast Furnace Company et al.*, 212 Fed. 63; *In re Progressive Wall Paper Corp.*, 229 Fed. 489; *Farmers’ Loan & Trust Co. vs. San Diego St. Car Co.*, 45 Fed. 518, 528; *United States vs. Mescall*, 215 U. S. 26; 91 N. E. 242; *The State of Washington vs. Sam Plastino*, 67 Wash. 374, 375. It was the substance of the baseless promise to pay that was aimed at, and not merely its form. Especially should this be the rule in interpreting constitutional provisions which are always to be construed broadly. If this provision does not forbid a guaranty and mortgage, given to secure the debt

of another, then it was needless to forbid the issuance of bonds, for an easy way was left open to avoid the prohibition.

The use of the word 'issue' in the section, whereby it is made to read, 'nor shall any corporation issue any bond or other obligation for the payment of money,' etc., may show that a formal written obligation was contemplated, and that the ordinary daily dealings of the corporation in carrying on its business was not aimed at. No other limitation is apparent in this regard."

(Record, p. 165.)

III.

Appellant claims that under any construction of this constitutional provision the contracts referred to are not within its inhibition, and if they are they were simply *ultra vires* acts, and that the corporation and the stockholders are estopped from denying their legal liability by reason of the stockholders having consented and approved of the execution of these instruments.

(See Appellant's brief, p. 80.)

This contention cannot be upheld.

It seems to use that appellant mistakes our contention in this regard. While in our opinion this contract of guaranty, and the mortgage securing the same were *ultra vires* of the Commonwealth Company, that company is defending solely on the

ground that the contract of guaranty is absolutely prohibited by the constitutional provision cited, and for that reason there can be no recovery. This constitutional provision in no uncertain terms says:

“Corporations *shall not* issue stock, except to bona fide subscribers therefor, or their assignees, nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. All fictitious increase of stock or indebtedness shall be void.”

It isn't a question of the Commonwealth Company exceeding its powers, as set forth in its charter, it is the question of it doing something absolutely prohibited by the constitution. When it appears in the case that an act has been done by a corporation absolutely prohibited, the court must stop, and can grant no relief. That provision of the constitution is something that cannot be waived by the corporation; if it should attempt to waive it, and the court during the trial should discover it, the court would be in duty bound under all the authorities to refuse relief. This constitutional provision differs from like provisions in the other States. Most of the other States have the prohibition against the issuance of bonds, or notes, while this provision prohibits it from issuing bonds, or other obligations for the payment of money.

Apellant's counsel do not seem to comprehend

the distinction between an *ultra vires* act, and an illegal act, or one prohibited by law. That distinction is well stated in 7 R. C. L. Sec. 677 and other authorities, as follows:

“* * * *A contract of a corporation may be both ultra vires and illegal, though it by no means follows that because such a contract is ultra vires it is also illegal, nor is illegality a necessary, or perhaps even a usual, characteristic of ultra vires contracts. Whether a contract is illegal or not is determined by its quality, and in this connection it matters little whether it be the contract of an individual or of a corporation, whether it be ultra vires or not is determined from a consideration of the powers expressly conferred on the corporation by the instrument of its creation, together with those other powers implied in the purposes of its creation and in the powers expressly granted. Of course a contract of a corporation to do an immoral thing, or for any immoral purpose, or against public policy, is void, and gives no right of action. The doctrine, therefore, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is that a corporation can not enter into and bind itself by a contract which is expressly prohibited by its charter or by statute; and in the applica-*

tion of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one can be premitted to justify an act that the legislature, within its constitutional power, has declared shall not be performed."

Citing Mutual Guaranty Fire Ins. Co. vs. Barker, 107 La. 143, 77 N. W. 868, 70 A. S. R. 149 and Note.

Bath Gas Light Co. vs. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664.

Distinction between Ultra Vires and Prohibited Commercial Paper .

a. In General. *With respect to the doctrine of Ultra Vires, a well grounded distinction exists between acts which are beyond the power conferred by statute upon the corporation in express terms, and acts which are prohibited by the express language of the statute. With respect to the former class of cases, the question presented to the intending customer of the corporation is often a nice question of interpretation, and the officers of the corporation presumptively have a better opportunity of understanding the limits of the power of the corporation than the customer has. The law will not therefore allow the corporation to take the benefits of the contract and escape the burdens. But with respect to contracts which are prohibited by the terms of positive statutes the*

rule is different. Applying the rule to commercial paper issued by corporations in contravention of statutory prohibitions, the rule is that such paper is absolutely void in the hands of any person, who may receive it; and this rule applies to the holders of such paper who reside outside the state in which the corporation has its origin and domicile and whose laws prohibit the issuing of the particular paper. Neither can an endorsee of such a note recover upon it in an action against his indorser. The note being void it will not be admitted in evidence in such an action although the holder of it might sue his endorser and recover of him the consideration paid for it. So if a bank draws a draft in violation of an express law, and the holder of it transfers it to his creditor in payment of a debt, and the bank becomes insolvent, such transferee can not maintain an action upon it against his transferer. Under a statute in Massachusetts prohibiting banking corporations from receiving or negotiating the bills or notes of foreign incorporated banks, except the bills of the bank of the U. S., it was held that a promissory note, payable in the prohibited bills to a banking corporation in Massachusetts was void, and that no action could be maintained upon it even after the statute had been repealed."

The distinction between an *ultra vires* act and an illegal act of a corporation is well stated by the Federal Court of the Second Circuit in re *Grand Union Company*, 219 Federal 353, the Court using the following language: (Op. p. 363):

“But we are told that the defense of *ultra vires* cannot be raised in this collateral proceeding. The phrase ‘*ultra vires*’ unfortunately has been used to designate, not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy or contrary to some statute expressly prohibiting them. The latter class of acts are now termed ‘illegal,’ and the term ‘*ultra vires*’ is confined to the former class. ‘*Ultra vires* contracts are contracts which are beyond the statutory powers of the corporation, and not contracts expressly prohibited by statute and contrary to the public policy of the Legislature.’ Cook on Corporations (7th Ed.) vol. 3, p. 2161, note. We do not need to consider when the defense of *ultra vires* may or may not be interposed. The objection here is, not that the contract is *ultra vires*, but that it is illegal. While a corporation is held in some states to be estopped from setting up the defense of *ultra vires* by having received the benefits of the contract, the courts so holding do not apply that principle to cases in which the contract is absolutely void. *National Home*

Building, etc., Co. vs. Home Savings Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; 10 Cyc. 1161, 1162.”

The same distinction between an *ultra vires* and an illegal contract is recognized by the United States Supreme Court in *D. La Vergne R. & M. Co. vs. German Savings Institution*, 175 U. S. 40; 40 L. Ed. 65; 20 Supreme Court Reports 20.

The same principle is announced by the English courts.

Scotish N. W. R. Co. vs. Stewart (1859), 5 Jur. N. S. (Eng.) 607.

In re. Birkbeck Permanent Benefit Bldg. Soc. (1912 C. A.), 2 Ch. (Eng.) 232.

There can be no ratification by the stockholders or trustees of a corporation of an act of the corporation prohibited by law, and thus make the same enforceable.

The cases cited by appellant of ratification and estoppel are cases where the acts were merely *ultra vires* and not illegal. That there can be no estoppel or successful ratification of an illegal act is established by the law of this country as well as of England.

It is aptly stated by Lord Cairns in *Ashbury R. Carriage & Iron Co., vs. Riche* (1875), L. R. 7 H. L. 672, 2 English Ruling Cases 304:

“If it was a contract void at its beginning,

it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'that is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the act of Parliament, they were prohibited from doing."

To the same effect in *re British Provident L. & F. Insurance Co.* (1883), 9 Jur. N. S. (Eng.) 631.

We are at a loss to understand upon what appellant's counsel base their remark on page 85 of their brief, in which they state:

"We do not concede that the Commonwealth Co. did not receive money's worth for its agreement of guaranty. It had property at stake liable to be foreclosed and lost. It was relieved of the burden to its business caused by the expenses of an unnecessary plant. Its business was relieved of the burden it was carrying of a large debt at a high rate of interest and due in substantial payments."

There is no evidence to sustain this statement,

in fact all of the evidence shows that the Commonwealth Company received nothing for the execution of its guaranty and mortgage securing the same, except the suppressing of competition and the removal of the danger of the T. I. & I. Company of Washington foreclosing its mortgage upon the T. I. & I. Company of Tacoma plant, and thus again place it in business in competition with the Commonwealth Company. This was not a consideration recognized by the constitutional provision above quoted.

The Lower Court, however, disposed of this question in the following language (Record, p. 164):

“As no money or property were received by the Commonwealth Company, nor labor done on its account, it is considered obvious that its guaranty and mortgage securing the debt of the T. I. & I. Company were given in violation of the foregoing provision. They are, therefore, both void as in violation of a law rather than *ultra vires* for mere want of power. 10 Cyc. 1116.”

SECOND.

LIABILITY OF INDIVIDUAL DEFENDANTS.

I.

Non-enforceability of an agreement or guaranty growing out of an illegal agreement.

As before stated, it must be plain to the Court that the agreement, "Exhibit B", executed by the Commonwealth Company, and "Exhibit C", the mortgage securing the same, as between it and the plaintiff are illegal and non-enforceable. It is claimed that the individual defendants in this case can be held by reason of the following provision in "Exhibit B":

"The undersigned, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, in consideration of the acceptance of the foregoing guaranty and agreements by the said Traders Trust Company of Oregon, and other valuable consideration do hereby agree and guaranty to and with the said Traders Trust Company that the foregoing guaranty, and each and every part thereof, is based upon a valuable consideration sufficient in law to bind the Commonwealth Company, and that the same is a valid and subsisting obligation of said Company."

This guaranty agreement of the individual defendants was part of the same transaction, (Exhibits "B" and "C", attached to the complaint), and was therefore necessarily illegal and void, for the reason set out above. This guaranty of the individual defendants being founded on the guaranty agreement of the Commonwealth Company, and "when the foundation fails all goes to the ground."

We contend that these individuals cannot be held,

(a) Because there was no consideration for their executing this contract;

(b) Because the contract itself is illegal, for all the reasons hereinbefore stated;

(c) Because this guaranty of the individual defendants is founded upon an illegal agreement, and is therefore itself illegal.

Any contract or agreement which is based upon an illegal contract cannot be enforced.

A recovery upon an account for goods sold and delivered by a corporation created to effectuate a combination of wall paper manufacturers intended and having the effect directly to restrain and monopolize trade and commerce cannot be had.

Continental Wall Paper Co. vs. Voight & Sons Co., 212 U. S. 227 (53 L. Ed. 486-505-506).

In any action brought in which it is necessary to prove an illegal contract in order to maintain the action courts will not enforce it, nor will they enforce alleged rights directly springing from such contract.

McMullen vs. Hoffman, 174 U. S. 638 (43 L. Ed.) 1117-1127-1128.

In the case at bar in order to recover against the individual defendants it would be necessary to prove, and introduce in evidence as part of the proof,

the contract of guaranty of the Commonwealth Company in order to make out a case against the individual defendants, and under the ruling in the case last cited, as soon as the illegality of the Commonwealth guaranty was shown no recovery could be had against the individuals.

So a new contract based upon compromise of an illegal contract cannot be enforced.

Stewart et al. vs. W. T. Rawleigh Med. Co.,
159 Pac. 1187.

The above case is particularly in point with the instant case, for the reason it was an attempt to hold the sureties on a written contract, which contract was in itself a contract in restraint of trade and competition, and therefore illegal.

Union Collection Co. vs. Buckman, 9 L. R. A.
(N. S.) 568; (88 Pac. 708).

An agreement attempting to nullify a statute regarding purchase and sale of stocks, etc., was void and no recovery could be had thereon.

Cory vs. Griffin, 63 N. E. 420.
See *McMillan vs. Barbour Asphalt Pave. Co.*,
38 N. W. 97.

The Supreme Court of the State of Washington has had occasion to pass upon this question in several decisions, and have upheld the contention of defendants.

Where a secret contract employing an agent to procure a recall election was void as against public policy the agent cannot recover for moneys expended as upon an executed, independent, implied contract of deposit, where to make a case plaintiff must rely upon the illegal contract itself, since the law will leave the parties where it finds them.

Stirtan vs. Blethan, 79 Wash. 10-16-20.

See also *Lewer vs. Cornelius*, 72 Wash. 124-129.

Tompkins vs. Seattle Const. Co., 54 Wash. Dec. 442.

Moser vs. Pantages, 54 Wash. Dec. 114.

II.

Non-enforceability of contract of sureties or guarantors of an illegal agreement.

Greenhood in his work on the doctrine of public policy, on page 1, lays down two rules:

“Rule 1. Any contract made by a competent party, upon valuable consideration, when made freely and intelligently, is valid, unless it comes within Rule II.

“Rule II. But if such contract bind the maker to do something opposed to the public policy of the State or Nation, or conflicts with the wants, interests, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the

times, it is void, however solemnly the same may be made."

Then further on page 14, the author says:

"Rule XV. Any contract of suretyship for the faithful performance of a contract within Rule II., is equally void (a), even though the surety has been fully indemnified by the principal debtor (b)."

And further on page 210 the author says:

"A contract to indemnify one from liability on an illegal contract (a), or for assuming a responsibility which it would be illegal for the promisor to assume (b), is void."

And further on page 211:

"Any contract to save one harmless from the consequences of an unlawful act (a), or breach of duty (b), is void."

Child's on Suretyship, at page 254, uses the following language:

"Section 133. A surety will not be bound if the principal executed the contract under duress, unless the surety signed with knowledge thereof; nor will a surety be bound if the principal was enduced to enter into the contract through fraud of the creditor; or if the principal's contract be illegal."

And again on page 255, as follows:

“Illegality of Principal Contract is a defense to the Surety. If the principal’s contract is illegal, the surety is not liable.

“Sec. 56. A surety is not bound if the contract is illegal. An illegal contract is void, and a surety thereon incurs no liability.”

Brandt on Suretyship and Guaranty, Section 4, page 21, says:

“A contract of indemnity must not be against public policy.”

And also on Section 19:

“If there is no principal contract, or if the principal contract is void as against public policy, or for want of consideration, or for want of proper parties, or for any other reason, there can be no contract of suretyship.”

And in Section 30:

“When the act of the principal for which the surety undertakes to become responsible is prohibited by law, the surety will not bound.”

These general principles as laid down by the foregoing text writers are sustained by the great weight of authority:

The sureties on a bond declared to be illegal were released in

*Smith vs. Alabama Fruit Growing Assn.
et al.*, 26 So. 232.

This case is approved by the Supreme Court of this State in

Jorguson vs. Apex Gold Mine Co., 74 Wash. 243.

In which the Court holds the guaranty of a corporation to pay dividends not earned void.

“While a surety on a corporation contract may be estopped by his execution of the contract to plead that it is *ultra vires* of the corporation, such contracts being objectionable only because they involve some matters beyond the scope of the corporate charter, there is no such estoppel as to a contract which is opposed to establish principles of public policy, or based upon an illegal consideration, or forbidden by statute.”

Schaun vs. Brandt, 82 Atl. 551.

Endorser of note of corporation which is prohibited from issuing notes is not liable thereon.

Southern Loan Co. vs. Morris, 44 American Dec. 188.

See *Bath Gas Light Co. vs. Chaffy*, 45 N. E. 390.

In this case the Court upheld the contract solely on the ground that it was *ultra vires*, and not il-

legal, but held that if it had been illegal the surety would have been released.

A guaranty of an illegal contract made on behalf of a City being intended to secure the performance of an unlawful act, is void, and cannot be enforced.

Howard vs. Smith, 38 S. W. 15.

To the same effect is:

Keith Co. vs. Ogalalla Power Co., 89 N. W. 375.

In this case suit was brought upon a bond to secure the performance of a contract, which contract the Court held was invalid, and hence that the bond was without consideration and non-enforceable.

Under the California Code contracts which fix the amount of damages for a breach are void and a contract of guaranty to pay the penalty prescribed for the breach is void, and does not bind the maker to pay even the actual damages incurred by such breach.

Jack vs. Linsheimer (Calif.), 58 Pac. 130-132.

This principle has been recognized by the Courts of this country from the earliest decisions.

Swift vs. Beers, 3 Denio. 67 (17 N. Y. Common Law Rep. 284).

So also in *Gill vs. Morris*, 27 Am. Rep. 744 (Tenn.).

It was held that a surety on a promissory note may plead in bar a judgment discharging the principal on account of the illegality of the note. (Confederate money case.)

The facts in the above entitled case are that in 1862 Gill loaned to Creed \$1,500.00 in Confederate money and took his note with Morris as surety. In a suit brought on this note against Creed the Court held that the note was based on an illegal consideration and dismissed the action. Afterward suit was brought against Morris, the surety, and the Court held that the judgment discharging the principal discharged him.

A surety bond taken as security for the conduct of an agent of a foreign corporation, which undertakes to do business in Pennsylvania without complying with the statutes concerning foreign corporations is invalid.

McCanna etc. vs. Citizens Trust etc. Co.,
76 Fed. 420.

For the same reason an express agent's bond was held invalid in

Daniels vs. Barney, 22 Ind. 207.

Also a life insurance agent's bond was held invalid in

Thorne vs. Travelers Insurance Co., 80 Pa. State, p. 1.

So also an indemnity bond providing for protection against plaintiff's unlawful act in seizing cattle not belonging to the mortgagor, was held void in

Rice Bros. etc. vs. National Bank of Commerce (Mo.) 73 S. W. 930.

The Court says in that case:

"The general principle of law invoked by defendant's counsel to defeat plaintiff's action is well settled. It is that when the consideration for a contract is illegal the contract is void, whether the illegality is disclosed by the contract itself, or is established by evidence outside. *Sumner vs. Sumners*, 54 Mo. 340. In furtherance of this principle, it is also well settled "that any promise, contract, or undertaking the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void, and will not maintain an action. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect, and in this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*. That which the law prohibits, either in terms or by affixing a penalty to it,

is unlawful, and it will but promote in one form that which it declares wrong in another. *White vs Buss*, 3 Cush. 448, quoted with approval in *Sprague vs. Rooney*, 104 Mo. 349, 16 S. W. 505."

So in *Mound vs. Baker*, 44 Atl. 346, it is held that a bond given to secure rent under a lease of property leased for the purpose of prostitution, which is unlawful, is void, and no recovery can be had thereon.

The Court in that case said:

"Therefore if this suit was upon the lease itself it could not be maintained. It can be maintained no better on the bond, for when the foundation fails all goes to the ground."

To the same effect is *Riley vs. Jordan*, 122 Mass. 231.

A well considered case from the Supreme Court of Missouri upholds our position in the following forcible language:

"A note was given to plaintiff in consideration of his pasturing one Hudson's cattle therein, most of which land was public domain, which said plaintiff had fenced contrary to law. The defendants who had a mortgage on the cattle guaranteed the note by endorsing it on the back. Held,

" 'As has already been stated that apart of

the care bestowed on Hudson's cattle by plaintiff was by means and use of an unlawful enclosure and the cowboys who maintained such enclosure, we cannot doubt that as to the part of the claim for keeping the cattle in the pasture was illegal and therefore the note must be held to have been given without any supporting consideration. *It is true this action is on the contract of guaranty and not the note, but the law is quite well settled that when the principal obligation is void for illegality that that infirmity will extend to and vitiate the contract of guaranty and will constitute a defense open to the guarantor in action on the guaranty itself.'*

"On rehearing plaintiff insisted note was issued as result of arbitration of the differences between the parties and the Court said, 'it is out of the power of individuals to legalize that which the law prohibits by executing a contract the consideration of which is the immediate fruit of a prohibited thing.'"

Tandy vs. Elmore-Cooper Livestock Com.,
87 S. W. 614 (Mo. 1905).

Pittsburg Constr. Co. vs. West Side Belt
Railway Co. et al., 154 Fed. 929.

The West Side Belt Railway Company was organized to build a railroad and it executed a contract with one Petrie to build the same, and at the same time gave Petrie permisison to sublet the

contract to the plaintiff, on a contract identical with his contract with the Railway Company. The Railway Company and individual defendants became sureties for Petrie on his contract with the plaintiff. The plaintiff was a foreign corporation and had not complied with the statutory requirements for doing business in Pennsylvania State, and its contracts were held therefore to be void.

“The suit here is against the sureties of the contractor, and the illegal contract the basis of the action. As the plaintiff must rely on its void contract to recover, the action must fail. The test as to whether the action is grounded upon the void contract depends on whether it requires the aid of an illegal transaction to establish the case, and if it be necessary to prove the illegal contract in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights springing from such agreements. *Johnson vs. Hulings, supra*, 103 Pa. 501, 49 Am. Rep. 131, *McMullen vs. Hoffman*, 174 U. S. 639, 19 Sup Ct. 839, 43 L. Ed. 1117.”

This rule is aptly stated in *Western Indemnity Co. vs. Crafts* (Circuit Court of Appeals, Sixth Circuit, March 6, 1917), 240 Federal, 1, in which the Court uses this language:

“The purpose of the whole transaction being to induce the state treasurer to make a de-

posit in defiance of the law, the indemnity contract is unenforceable because of the illegality of the consideration; the whole transaction being permeated by such illegality.

Every part of the consideration goes equally to the whole promise, and, if any part of it is contrary to public policy, the whole promise falls."

The following cases sustain this doctrine:

Joyce, Defenses to Commercial Paper, Sec. 288, 290.

Thompson, Corporations, Vol. 3, Sec. 2190, 10 *Cyc.* 1116, Sec. 6.

7 R. C. L. Sec. 678.

32 *Cyc.* 25, 29; 9 *Cyc.* 563; 20 *Cyc.* 1420.

Williston's Wald's Pollock on Contracts, p. 491-495.

Southern Loan Co. vs. Morris, 2 Pa. St. 175, 44 Am. Dec. 188.

Dennison vs. Gibson, 24 Mich. 187.

Root vs. Goddard, Fed Case 12037.

Root vs. Wallace, Fed. Case 12039.

Board of Education vs. Thompson, 33 Ohio St. 321.

Higgins vs. Quigley, 54 N. E. 136.

State vs. Brabttley, 27 Ala. 44.

Ferry vs. Buchard, 21 Conn. 587.

Shuttleworth vs. Levi, 13 Bush. (Ky.) 195.

Ancorn vs. Guillot, 10 La. Ann. 124.

- Fisher vs. Shattuck*, 17 Pick (Mass.) 252.
Crum vs. Wilson, 61 Miss. 233.
U. S. vs. Tingley, 5 Pet. 115, 8 L. ed. 66.
Daniels vs. Barney, 22 Ind. 207.
State vs. Vion, 12 La. Ann. 688.
Levy vs. Wise, 15 La. Anna. 38.
Lancaster Township vs. Graves, 96 N. E. 172.
Henry & Co. vs. Fry, 137 N. Y. Sup. 894.
Woodson vs. Batnett, 2 Hen. & Mun. 80, 3 Am. Dec. 612.
Trent Importing Co. vs. Wheelwright, 84 Atl. 542.
Luce vs. Foster, 60 N. W. 1027.
H. Koehler & Co. vs. Reinheimer, 45 N. Y. Sup. 337.
Hill vs. Smith, Morris (Iowa) 102.
Day vs. Spiral Spring Buggy Co., 23 N. W. 628.
Cahill vs. Golman, 146 N. Y. Sup. 224.
Forsyth vs. Woods, 78 U. S., 11 Wall. 484. 20 L. Ed. 207.
Cobbs vs. Nixon, 42 N. W., 808 (Mich.)
Ramsey's Estate vs. Whitbeck, 56 N. E. 322.

It must be apparent to the Court from reading the above cases that no recovery can be had in any event against the individual defendants. It would be a strange proposition if the Court should hold, which it seems to us it must, that the contract of guaranty of the Commonwealth Company, and

the mortgage securing the same were illegal and void, and no recovery could be had thereunder, but that a recovery could be had against the individual defendants on their guaranty, when the basis of such recovery must be an illegal and void contract. The Court would say in one breath there could be no recovery against the Commonwealth Company, because its contract is prohibited by law, but in the next breath we will allow a recovery against the individual sureties as guarantors of this contract, which is prohibited by law. No such recovery in our opinion could be upheld in either law or equity.

CONTENTION OF APPELLANT ON LIABILITY OF INDIVIDUAL DEFENDANTS.

Appellant's claim in this connection is found on pages 88 to 92, inclusive, of its brief.

Counsel for appellant again fails to distinguish between a contract *ultra vires*, of a corporation, and one illegal and prohibited by law. They refer in their argument to the contract of a minor and a married woman, or a natural person under disability. Those instances are not parallel with the contract of guaranty of the Commonwealth Company and the individuals in the case at bar. The disability of a minor is one that he can take advantage of or not, as he sees fit. The disability of a married woman, or a natural person under a similar disability is one they can take advantage of or not, as they see fit. The want of power of a

corporation to make a contract is one it and its stockholders can take advantage of or not, as it sees fit. Not so, however, with a contract forbidden by law. That cannot be waived. The Court itself will see to it that if it is forbidden by law it will not be enforced. It isn't a mere want of power of the Commonwealth Company to enter into this contract, it is the fact that it was forbidden by law, was illegal, and as shown by the cases hereinbefore cited, if the contract of the Commonwealth Company was forbidden by law and illegal, that taints and makes the contract of the individual sureties illegal and unenforceable.

We will concede for the sake of argument that if the contract of guaranty signed by the Commonwealth Company was *ultra vires*, it would not release the individual guarantors, but our contention is that the contract of guaranty of the Commonwealth Company being illegal and prohibited by law, there can be no recovery in any event against the individual guarantors.

Counsel for appellant in their brief cite the case of *Backus vs. Feeks*, 71 Wash. 508. That case simply holds as follows:

"Sureties in a bond guaranteeing the performance of a contract, which is not illegal or immoral, are bound by their guaranty, although the contract cannot be enforced against the principal."

This is the statement of a principle that is maintained by all the authorities, and we have no contention to make in that regard. Here again was a case where the defendant could take advantage of the disability or not, as he saw fit.

Reliance is also placed by appellant upon the English case of *Yorkshire Ry. Wagon Co. vs. McClure*, 19 Ch. D. 478, 51 L. J. Ch. 259. The Supreme Court of this State in the Backus case refers to that case and says:

“In the McClure case it was held that the lender may recover against the surety, although the loan was made to a railway company, which could not borrow.”

It appears in that case that the railroad company had exceeded its authority for borrowing money, and in that case the Court says:

“It was argued by his (defendant McClure) counsel that * * * the transaction was *malum in se* * * * I see no reason for believing that the directors did anything *malum in se*.”

“Upon the whole case I hold that the transaction was a borrowing by the railway company, and an attempt to give a security for the loan on the rolling stock, and that this so far as the company was concerned was *ultra vires*, and void. I must therefore dismiss the action against the company.”

The Court then held the sureties liable.

The same distinction is recognized in the latter English case of *In re Birkbeck Permanent Building Society* (1912) C. A. (2 Ch. Eng. 232).

The case of *Remsen vs. Graves*, 41 N. Y. 471, cited by plaintiff was also a case holding sureties on an *ultra vires* contract.

Appellant in its brief on page 92, quotes a portion of Section 63 (p.334), of Brandt on Suretyship and Guaranty. The part quoted sustains our contention, because the author says:

“He (the surety) has the right to oppose all which are inherent to the debt.”

The contract of guaranty in the case at bar is the debt, and under Brandt we have the right to defend as to all which is inherent to the debt. The debt itself is illegal; is prohibited by statute; therefore that illegality is inherent to the debt, and we have a right to defend. It is interesting, however, to read further of this same section in Brandt on Suretyship and Guaranty, in which he uses the following language:

“Prothier distinguishes them into exceptions in personam and exceptions in rem. The latter, which go to the contract itself, such as fraud, violence or whatever entirely avoids the obligation, may be pleaded by the surety; but the former, which are grounded on the

insolvency or partial solvency of the debtor, or which result from a cession of his property, or are the consequences of his minority, cannot be opposed to the creditor. Where a statute prohibited the making of a particular kind of note by a bank, it was held that such a note was void, and a guaranty of the note was likewise void. Where property of the principal sufficient to satisfy the debt was levied on, it was held that such levy satisfied the debt as to the principal; and consequently as to the surety. The Court said: 'It would be as difficult for me to conceive of a surety's liability continuing after the principal obligation was discharged as of a shadow remaining after the substance was removed.' A justice of the peace required two parties who were before him for examination to enter into a joint recognizance with surety when he had no right to require a joint obligation from both, but had power only to require a several recognizance from each. Such a joint recognizance was given, and it was held that it was void as to the principals and consequently as to the surety. The court said: 'It is a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such principal, and that the nullity of the principal obligation necessarily induces the nullity of the

accessory. Without a principal there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal.' ”

Again appellant refers to section 17 (p. 352), Brandt on Suretyship and Guaranty. Let us quote a portion of the section :

“Where a party becomes the surety of a married woman, an infant, or other person incapable of contracting, he is bound, although the principal is not. With reference to this it has been said that: ‘Fraud, illegality or mistake, which may rescind the contract of the principal, induces the discharge of the sureties; but if the invalidity of the contract rests upon reasons personal to the principal, in the nature of a privilege or protection, the principal requires a personal defense against the contract,’ but the contract subsists, and the sureties may be charged thereon. The disability of the principal may be the very reason why the surety was required.”

The author says, “that illegality which may rescind the contract of the principal induces the discharge of the sureties,” exactly what we maintain in this action.

The case of *Jorguson vs. Apex Gold Mines Company*, 74 Wash. 243, hereinbefore cited, holds:

“A bond by a corporation guaranteeing dividends in an amount equal to the amount paid for the stock, makes the stock subscription a ficti-

tious one and violates Article 12, Section 6, of the Constitution prohibiting the issuing of stock, except to bona fide holders for full value."

In that case the corporation signed not only the contract, but also the bond, and the contract was held to be void as against public policy, and in violation of Remington & Ballinger's Code, Section 3697, and the bond was held to be void for the reasons above stated.

In the opinion in the Apex Gold Mine case the Court cites with approval the case of *Smith vs. Alabama Fruit Growing & Winery Assn.*, 26 So. 232, and uses in that connection the following language:

"We have found one case where the facts are so similar that it would be useless to attempt to distinguish them: *Smith vs. Alabama Fruit Growing & Winery Assn.*, 123 Ala. 538, 26 South 232. The corporation there sold to the plaintiff \$1,500 worth of its capital stock, and executed its bond with sureties that it would return the \$1,500 in four semi-annual dividends. These dividends were not paid, and action was brought upon the bond. A demurrer was interposed to the complaint upon the grounds (1) that the contract was illegal and void, in that it undertook to indemnify plaintiffs against loss for a purchase of stock, making issue thereof fictitious and without consideration; (2) that the contract was in violation of the consti-

tution prohibiting corporations to issue stock or any bond for the payment of money except for money, labor done, or property actually received, and declaring void all fictitious increase of stock; (3) that it appeared from the complaint that the contract sued upon was illegal, without consideration, and void. This demurrer was sustained, and on appeal the Court, in affirming the judgment, said:

“It requires little, if indeed anything, beyond this statement of the case to demonstrate the correctness of the city court’s ruling. The contract sued on is, of course, executory, and its enforcement is sought in this action in furtherance and completion and consummation of a fictitious subscription to the capital stock of a corporation, a transaction prohibited by the organic law of the land and frequently denounced as vicious and incapable of conferring or passing any rights. The jurisdiction of our courts cannot be invoked to enforcement and execution of such undertakings. In substance the contract is for the payment back by the corporation to the subscriber for its stock of the money he subscribed, thus leaving the issuance of the shares to him wholly unsupported by any consideration, fictitious and void; and the action upon the contract is an invocation of the powers of the courts to the accomplishment of this end expressly forbidden

by the constitution of the State. If this could be done an easy road would be opened to the utter emasculation of this most just and necessary provision of the constitution by evasions so palpable as to be little, if at all, short of avowed and direct attempts to defy and override it.' ”

In the Alabama case, it will be noticed that there were individual sureties on the bond, and they were released together with the principal, on account of the illegality attaching to the transaction, a case on all fours with the case at bar.

An interesting and instructive case on the distinction between the liabilities of sureties on *ultra vires* contracts and illegal contracts of a corporation is *Shaun vs. Brandt*, 82 Atl. 551. The distinction between an *ultra vires* contract, and a contract prohibited by law is so lucidly set forth in the opinion that we quote from page 553, as follows:

“The appellant contends, however, that the rule stated cannot be applied in this case because the suit is against the surety, who is estopped from denying the authority of the principal to execute the bond, and he cites authorities supporting the proposition that the execution as surety of a bond given by a corporation estops the surety from denying the existence of the corporation or its authority to make the bond. But this contention entirely

overlooks the distinction between an ultra vires contract and a contract based upon illegal consideration. In *Md. Trust Co. vs. Mechanics' Bank*, *supra*, Chief Judge McSherry says: 'Ultra vires and illegality represent totally different ideas. *Bissell vs. Railroad*, 22 N. W. 269. Ultra vires contracts are, strictly speaking, only those which are defective solely because they are beyond the power of the corporation, when they involve some adventure or undertaking not within the scope of the charter, which is the rule of its corporate action. *Leslie vs. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456. If the contract is illegal as in violation of established principles of public policy, it cannot, of course, be enforced. 2 Page on Contracts, Sec. 1084, and the like result will follow if the contract is repugnant to the Code.' The distinction is also recognized in the case of *Burke vs. Smith*, *supra*, where it is said: 'All the cases distinguish between an ultra vires act and one that is unlawful and illegal. In certain cases an indorser may be held upon a note, the consideration of which is based upon an ultra vires act, but a contract to do an illegal and one against public policy is held to be a contract of "evil tendency" and unenforceable. *Emerson vs. Townsend*, 73 Md. 224 (20 Atl. 984); *Hanauer vs Doane*, 12 Wall. 342 (20 L. Ed. 439) *Lester vs. Bank*, 33

Md. 562 (3 Am. Rep. 211), *Md. Trust Co. vs. Mechanics' Bank*, 102 Md. 616 (63 Atl. 70); *Black vs. Bank of Westminster*, 96 Md. 399 (54 Atl. 88).' In 27 *Ency. of Law* (2d Ed.) 442, it is stated: 'A person cannot bind himself as surety in an obligation executed in violation of an express statute, nor can he evade the spirit of the law by doing indirectly what he is forbidden to do directly. The contract must not be opposed to public policy.' "

See also 32 *Cyc.* 29.

Counsel for plaintiff in their brief discuss this proposition as though the act of the Commonwealth Company in signing its contract of guaranty was *ultra vires* only, and not prohibited by positive law.

The cases cited by appellant on page 92 of its brief are cases where the contract was *ultra vires* only.

Again we cannot find language which seems to us more fully supports the contention of appellees in this case, and entirely refutes the contention of appellant, than that found in the opinion of the Lower Court on page 167 of the Record, as follows:

"The Foggs and Gove executed a guaranty of the guaranty of the Commonwealth Company in the following language:

“ ‘The undersigned, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, in consideration of the acceptance of the foregoing guaranty and agreements by the said Traders’ Trust Company of Oregon, and other valuable considerations do hereby agree and guaranty to and with the said Traders’ Trust Company that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration sufficient in law to bind the Commonwealth Company, and that the same is a valid and subsisting obligation of said Company.’

“Having held that the guaranty of the Commonwealth Company was invalid as a direct violation of the constitutional prohibition of the state, above set forth (Article XII., Sec. 6), and not merely *ultra vires*, it follows that the guarantee of these individuals, in contravention of its public policy, is also invalid. Such a prohibition cannot be waived. *Jorguson vs. Apex Gold Mines Company*, 74 Wash. 243; *Smith vs. Alabama Fruit Growers’ & Wine Association*, 26 So. 232; *Ramsey’s Estate vs. Whitebeck*, 56 N. E. 322; *Schaun vs. Brandt*, 82 Atl. 551; 32 Cyc. 29; *McMullan vs. Hoffman*, 174 U. S. 639; *Cory vs. Griffen*, 63 N. E. 420.”

ESTOPPEL.

The appellant on page 80 of its brief, makes the astounding claim that the Commonwealth Company, its stockholders, and the Foggs and Gove, are estopped from pleading the illegality of the Commonwealth guaranty, and the mortgage securing the same, and the individual guaranty of the individual defendants. One of the reasons for such estoppel is claimed that the stockholders of the Commonwealth are estopped "first, by accepting the cancellation of the old mortgage, and the surrender of the old series of notes." The evidence shows that the T. I. & I. Company of Tacoma was the corporation that accepted the cancellation of the mortgage, and the old series of notes, instead of the Commonwealth Company. However, in any event there can be no estoppel as to either the corporation, the Commonwealth Company, its stockholders, or the individual defendants.

It is true that in some cases the stockholders of a corporation, and the corporation may be estopped from defending against an *ultra vires* act of the corporation, but the principle is well established by all the Courts that there is no such estoppel as to a contract, which is opposed to established principles of public policy, or based on an illegal consideration, or forbidden by statute or constitutional law.

This principle is upheld in all of the cases cited

by us under the discussion of the liability of the corporation of the Commonwealth Company and the individual defendants, but in addition to those authorities we cite the following:

Schaun vs. Brandt, 82 Atl. 551.

Lewis vs. City of Shreveport, 108 U. S. 282;
27 L. Ed. 728.

Martin vs. Zellerbach, 38 Cal. 301, Op. 310.

The argument of the appellant under the head of "Estoppel," is simply another outgrowth of its failure to distinguish between an act simply *ultra vires* of a corporation, and an act prohibited by law, and needs no further discussion.

THIRD.

LIABILITY OF T. I. & I. COMPANY OF TACOMA.

The argument and authorities cited in this brief to show the non-liability of the Commonwealth Company apply with equal force to our contention that there is no liability even on the part of the T. I. & I. Company of Tacoma in this action.

The transactions of December, 1909, whereby the T. I. & I. Company of Tacoma took over the T. I. & I. Company of Washington, and whereby Franklin Fogg took over the abstract plant of the Wilson Company and eliminated that from operation, were all part and parcel of an illegal scheme to monopolize the abstract business in Pierce

County, Washington. The real plaintiffs in this action, Smith and Willoughby, were parties to that, and had knowledge of its object|. All the negotiations which led up to, and the final execution of the instruments of December 2, 1911, show that they had for their purpose the monopolization of the abstract business in Pierce County, Washington, Smith and Willoughby, the real plaintiffs in this action, were parties to all of those transactions, and benefitted thereby, and no one can read the testimony in this case without being convinced that they, Smith and Willoughby, well knew the object of the execution of the instruments on December, 1911, the boxing up and shipping of the abstract plant to Portland, and well knew that the dominant purpose of all of the transactions from December 1909 down to December 1911, was to restrain trade and competition in the abstract business, and to create a monopoly of such business in Pierce County, in the hands of the stockholders of the Commonwealth Company. Suppose everyone interested in these transactions had gone on the witness stand and testified that that was not the purpose of these transactions, would the Court for a moment believe it? The mere recital of the facts of what was actually done, and the reading of the documents executed must impress any open-minded man that the sole object of all of these transactions was this unlawful purpose. How then can there be a recovery against the T. I. & I. Company of Tacoma? The instruments

executed by it are stamped and branded with this illegal purpose and design, and under all of the authorities the Court can grant no relief against any of the defendants herein, but must leave the parties where it finds them, however onerous or burdensome to some of them this ruling may be, for the reason, as is stated in many of the authorities above cited, the rights of the individuals are subservient to the rights of the public.

As was said in *Continental Wall Paper Co. vs. Voight & Sons*, 212 U. S. 227 (53 L. Ed. 486), quoting from *McMullen vs. Hoffman*, 175 U. S. 639-654-669 (43 L. Ed. 1117-1123-1128):

“The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,’ citing many English and American cases. ‘The Court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the en-

forcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.' In that case the principle announced in *Coppell vs. Hall*, 7 Wall. 542, 558, 19 L. Ed. 244, 248, was reaffirmed, namely:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Whenever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.' "

In *Fields vs. Holland*, 1915 C. L. R. A. 865-870, 165 S. W. 699, the Supreme Court of Kentucky had under consideration a contract in restraint of trade and monopolization of the transfer business.

One of the parties had paid to the other Fifteen Hundred Dollars as a part of his consideration for entering into this contract, and also as a part consideration for his keeping out of business, it was claimed in the complaint that the other party had violated the contract, and the party who had made payment as aforesaid brought suit for an injunction enjoining the other party from carrying on the business, and in the event that an injunction should not be granted, that he recover back his Fifteen Hundred Dollars paid, and in event that should not be granted that he recover damages for breach of the contract. The Court held against him on all these propositions, refusing an injunction, refusing him the recovery of the Fifteen Hundred Dollars paid, or any damages, saying in that connection:

“If correct in this view, it further follows that the Circuit Court did not err in refusing to rescind the contract, or to award appellants damages for its breach by appellees, for it is a well recognized rule that the courts will not grant relief to the parties to an illegal contract, or allow a recovery of damages by either against the other for its breach. The contract being against public policy, and the parties in *pari delicto*, no right of action can be predicated thereon by either of them. They will be left by the Court where their own conduct placed them. *Ratcliffe vs. Smith*, 13 Bush, 172; *Chesapeake & O. R. Co. vs. Maysville*

Brick Co., 132 Ky. 643, 116 S. W. 1183; *Hancock vs. Louisville & N. R. Co.*, 145 U. S. 416; 36 L. Ed. 757; 12 Sup. Ct. Rep. 969; *Harriman vs. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, 25 Sup. Ct. Rep. 493."

This principle is so well stated in 6 *Ruling Case Law*, Sec. 218, page 823, that we feel compelled to quote the same, although we may be subject to criticism for being too prolix:

"The rule which limits the enforcement of rights growing out of illegal contracts to cases in which the action may be maintained independently of the contract is generally applied where an illegal contract is sought to be enforced by a plaintiff who, with respect to the contract in question, is as guilty as the defendant. Except when public policy requires that relief should be given to such plaintiffs, the courts almost invariably apply the maxim *potior est conditio defendentis et possidentis*. As between parties in *pari delicto* the courts ordinarily will not enforce an illegal contract or any supposed rights growing out of it. The rule is often expressed by saying that in such cases the law will leave the parties where it finds them. This view of the question, it seems, is not satisfactory to some very able and very just minds, because it permits a party to plead his own wrong or infamy, as the case may be, and thereby obtain

an unconscientious advantage over his adversary, from whom he has perhaps received some valuable consideration for the execution of the instrument the payment of which he resists. This is undoubtedly true; but it is equally true that the law does not undertake in such cases to settle any question of conscience as between the parties. The courts are called upon to perform a higher duty than to settle questions of honor between wrongdoers; they are to protect society from the influence of contracts made in disregard of the public weal. The parties to such a contract are presumed in law to know its character when they enter into it. If they speculate upon the chances of the failure of the government whose laws they disregard and whose authority they condemn, they must learn that the law cannot respect that which is illegal, and that courts will never give effect to a contract which looks, however remotely or contingently, to the destruction of the government. The Court refuses to enforce such a contract, and it permits the defendant, to set up its illegality, not out of any regard for the defendant, but only on account of the public interest. It has often been stated that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed because public policy requires its allowance the

better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. It is sometimes said that this is a defense which the guilty is allowed to set up against his associate in guilt, as a sort of a punishment for the participation of the latter in the violation of law. Such are the reasons which support the general proposition that whichever party has to resort to setting up the illegal transaction in order to establish or support an affirmative claim of right must lose. Where the parties are in *pari delicto* no affirmative relief of any kind will be given to one against the other. The only equitable remedies which they can obtain are such as are purely defensive. While an unlawful contract the parties to which are in *pari delicto* remains executory, its invalidity is a defense in a court of law, and a court of equity will order its cancellation or enjoin the enforcement of security *only* as an equitable mode of making that defense effectual, and when necessary for that purpose. The rule denying a remedy to a person in *pari delicto* will not prevent equitable relief against the enforcement of the power of sale in a mortgage which is against public policy."

FOURTH.

CONTENTION OF APPELLANT ON THE CLAIM OF APPELLEES THAT ALL THE TRANSACTIONS OF 1909 AND 1911, ARE VOID AND NON-ENFORCEABLE AS BEING AGAINST PUBLIC POLICY, IN RESTRAINT OF TRADE AND COMPETITION, AND TENDING TO FORM A MONOPOLY.

In view of the fact that appellants' counsel all through their brief claim that the transactions of 1909 were simply a straight sale of the plant and goodwill of the T. I. & I. Company of Washington, and that the transactions of December, 1911, were simply a change of the indebtedness of the T. I. & I. Company, and a change of security, and that if a monopoly in the abstract business was formed or contemplated, Smith and Willoughby had no part in it, did not participate in it, and knew nothing about it, we think it best to briefly state the situation of the abstract business prior to December 7, 1909, and subsequent thereto, and state briefly the transactions from 1909 down to December, 1911, for the purpose of showing that not only were Smith and Willoughby aware of the formation of the monopoly, but helped form it, participated in it, were benefitted by it, and that the dominant purpose of all the parties was to form a monopoly of the abstract business in Pierce County.

Prior to December 7, 1909, the T. I. & I. Company of Washington, the Commonwealth Company, and the Wilson Company were each engaged in the abstract business in Pierce County, and were carrying on said business in active and actual competition with each other, and controlled the abstract business. That the competition between said companies was very keen, and they were cutting prices. Something had to be done to keep up the prices. It is fair to presume from all of the evidence, and the actions of the parties that the Foggs, Willoughby and Smith had discussed this situation with the end in view of remedying it. We find them for some days prior to December 6, 1909, negotiating the sale of the abstract plant of the T. I. & I. Company of Washington, to a corporation to be formed. They took the next step pending these negotiations on the 6th day of December, 1909, when Willoughby and Franklin Fogg leased of the Wilson Company its entire abstract plant and put it out of business in Pierce County.

We desire to call particular attention to the provisions of that lease, which is attached to the stipulation on file here marked Exhibit "A," Record, p. 100. For what purpose did Willoughby and Fogg lease that plant and put it out of business? It could have been for no other purpose than to restrain trade and competition, and as a step to the formation of a monopoly in the abstract business. What interest did Willoughby have in

assigning said lease the next day to Fogg? He received nothing for it, but by that time the negotiations for the sale of the T. I. & I. Company's plant had been consummated, and he knew that the assignment of that lease to Fogg, the sale of the T. I. & I. Company's plant to the new corporation was for the purpose of, and did actually form a monopoly of the abstract business in Pierce County, and Smith and Willoughby were parties to the same, participated in it, and helped form it.

It seems to us it is useless to say that the only thing that Smith and Willoughby did was to sell their plant and goodwill, and that they had no knowledge of, and did not help form the monopoly.

On December 7, 1909, the T. I. & I. Company of Tacoma having been incorporated by Mr. Willoughby, with himself as its President, and a subscriber to Forty-eight Hundred of Five Thousand Dollars of the capital stock, purchased the plant and goodwill of the T. I. & I. Company of Washington, for One Hundred Thousand Dollars, of which Ten Thousand Dollars was paid in cash, and notes for Ninety Thousand Dollars, secured by a mortgage upon the plant purchased, a copy of which mortgage is attached to the defendants' answer marked Exhibit 1, Record p. 50.

It was recognized that it could afford no security other than the plant itself. The purchase price notes for Ninety Thousand Dollars, and the mort-

gage given to secure the same, were all executed by Mr. Willoughby as president of the company, and it is provided in the mortgage that Smith and Willoughby should have joint control with the T. I. & I. Company of Tacoma, of this plant. This consummated the monopoly of the abstract business in Pierce County in the hands of the Foggs and Gove, with Mr. Willoughby as an active participant and a supervisor of the property and conduct of the T. I. & I. Company of Tacoma. The T. I. & I. Company of Tacoma with the capitalization of only Five Thousand Dollars had only that amount at stake, while Smith and Willoughby had Ninety Thousand Dollars, a substantial interest in the property controlled by the monopoly, and a substantial interest in seeing to it that the monopoly succeeded in the purposes for which it was formed, i. e., the monopolization of the abstract business in Pierce County. .

Under this state of facts can it be said that Smith and Willoughby did nothing but sell their plant? Such a statement, it appears to us from the record, is an insult to an intelligent person. Smith and Willoughby's interests had a mortgage on the only property owned by the T. I. & I. Company of Tacoma, and they could only hope to realize on this large amount of indebtedness by the success of this monopoly. They were interested in it to this extent, that it must succeed in order to pay them.

The T. I. & I. Company of Tacoma, as it was compelled to do under its mortgage, conducted an abstract business presumably satisfactory to Smith and Willoughby, and under their supervision with Mr. Gove as vice president, and in active management of it, and it, and the Commonwealth Company did all the abstract business in the county, the Smith and Willoughby's and the Foggs and Gove having succeeded in forming a monopoly of that business.

In the latter part of 1910, the Tacoma Title Company, managed by Mr. Lehmon, entered into the abstract field in the county, and commenced to interfere with the plans of the monopoly, and to take some of its business, and on July 22nd, 1911, we find Mr. Fogg writing to Mr. Willoughby concerning the situation. This letter is found in the sixth paragraph of the stipulation on file, and to a part of it we desire to call the Court's attention particularly:

“Mr. A. D. Willoughby,
Portland, Oregon.

Friend Willoughby:

The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will

give us your share of help, we will still try to pull the thing out O. K., as almost any revenue derived will be more than could be had by fighting him and each other, too. After considering a good many plans, this one seems to be the best."

Record, p. 79.

Mr. Fogg then suggests a plan of increasing the capital stock, and giving Smith, Willoughby and Wilson a share of the stock, and later in the letter says:

"Our interests here are mutual and must be worked out together or both plants would be operated at a loss, for the benefit of the public.

Our idea would be to work into title certificates as fast as possible and use every effort to put new additions under the certificate system, and once under a certificate, that addition would be out of reach of any other company. By working for the first few years to keep the field clear rather than to make anything more than interest on the investment, we would have in the course of five or ten years, a business that would be almost out of the line of competition, both on account of the cost of another plant and by that time, we would have a large part of the titles under certificate system."

Record, p. 81.

Between the receipt of that letter and August 3, a plan was suggested by Mr. Willoughby to the Fogg, but the evidence is silent as to what that plan was, but under date of August 3, Horace Fogg again wrote Mr. Willoughby, which letter is also contained in Paragraph six of the stipulation, part of which letter is as follows:

“Dear Mr. Willoughby:

I am afraid our ideas are too far apart to do us any good. The situation here is so bad that we must have some relief or drop out of our present deals. The plan you suggested would not relieve us any, but would in fact make it far more binding on us, and if we are not able to make enough money to pay the amounts due under the present plan, we would not be able to do so under your plan.”

* * * Whether or not any deal is made with you or Wilson, the rate will have to be cut to seventy-five cents and we expect to do that at once and with the intention of making it a permanent rate. We can pay expenses at fifty cents if we get most of the business and both Frank and Mr. Gove thought it the best plan to come back to our own company and make a permanent rate of fifty cents and not try to buy the other plants as long as there was a fourth man in the field whom we had to fight anyway, but I thought I would take it up with

you first and get your ideas on the matter before we did anything."

Record, p. 81-82.

If the English language means anything at all, these letters show that the monopoly was commencing to slip, and it was the intention of the Fogg and Gove to do whatever was necessary to maintain that monopoly. They consulted with Willoughby and Smith, who were vitally interested in the success of the monopoly, as to the best manner of suppressing the new man and sustaining the monopoly, and plans were submitted back and forth for that purpose.

The T. I. & I. Company of Tacoma, who owed the indebtedness secured by a mortgage on the plant, had nothing to pay with, except the earnings of the plant, and according to the evidence the earnings of the plant were falling off, so that the prospect not only for Smith and Willoughby to get their money, but the prospect of maintaining the monopoly looked dark indeed. That was fully understood by Smith and Willoughby, as is shown by the letter of August 7th, 1911, written by Willoughby to Horace Fogg, which is also contained in Paragraph six of the stipulation, in which he says:

"Dear Sir:

Your letter of August third relative to the abstract situation at Tacoma has been received.

We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. *Would rather take the plant back and operate it* than to go into a proposition whereby we would be a minority stock holder and therefore have nothing to say in the management of the company.

I expect to be in Tacoma within the next two weeks and will then talk over with you any scheme you may have that will be of mutual benefit to us all."

Record, p. 83.

It is apparent from this letter that if some plan was not formulated satisfactory to the Smith and Willoughby interests they would foreclose their mortgage, take back the plant and operate it, and thus dissolve the monopoly, which the Foggs and Gove did not want done, neither did Smith and Willoughby, if it could be operated so as to pay their indebtedness.

Even at this time they say in their letter, they would not go into any deal, unless they could have something to say in the management thereof.

The dullness in the abstract business continued, and the T. I. & I. Company of Tacoma were not able to make its payments, and an installment of interest was to become due on the 7th day of

December, 1911, amounting to \$2,800.00, and an installment of principal of \$5,000.00, which the T. I. & I. Company of Tacoma could not pay, and in default of which the mortgage could be foreclosed, and the plant sold thereunder, which would result in but one thing, that either the plant would be taken by the Willoughby and Smith interests, and they would engage in business here, or it would be sold to some other party who would enter into business in competition with the Commonwealth Company, a result which the testimony fairly shows was not desired by any of the parties. It is true that Smith and Willoughby testified that they had never threatened to foreclose this mortgage, but Willoughby says in his letter above referred to, that if an arrangement satisfactory to him is not made he would take the plant back and operate it. It is fairly deducible from the testimony that they came to Tacoma about December 1, for the purpose of making some new arrangement satisfactory to them, or else foreclose the mortgage. What was the situation then on December 1, 1911?

The T. I. & I. Company of Tacoma was practically insolvent; it could not pay what was due on the mortgage; the Smith and Willoughby interests were saying, make some arrangement satisfactory to us or we will foreclose and put the plant back in business; all parties were anxious to prevent that being done; were anxious in other words to not only continue, but to make such arrangement

ments as would bolster up and solidify the monopoly in the abstract business. These negotiations lasted several days and finally culminated in the T. I. & I. Company of Tacoma executing new notes and a new mortgage securing the same for the balance due on the mortgage indebtedness, the time of payment being extended, and the old notes and mortgage being cancelled and given up to the T. I. & I. Company.

For the first time then the Commonwealth Company appears on the scene, and executes its contract of guaranty wholly without any consideration whatever, except that boxing up and removing from the danger of competition the T. I. & I. Company's plant, shipping the same to Portland where there would be no danger of it being used in competition in Pierce County, having it stored in a safe deposit vault under the joint control of Smith and Willoughby and itself, and the further consideration of Smith and Willoughby executing the agreement of December 2, 1911, whereby they agreed not to enter into the abstract business in Pierce County. This was all done by the consent and agreement of Smith and Willoughby, and was one of many transactions in which they had a hand looking towards the monopolization of the abstract business. What interest was it to the Commonwealth Company that this plant was shipped out of the State, except to remove it from competition? What interest was it to Smith and Willoughby to ship it out of the State

and put it in cold storage? None, except that it helped the Commonwealth Company maintain its monopoly. It is useless to say that it was better security boxed up in Portland than it was as a going concern in Tacoma. As far as the security on the plant was concerned it was weakened by the act of moving it to Portland, and no conclusion can be drawn, except that it was done for the sole and only purpose of aiding the Commonwealth Company in maintaining a monopoly in Pierce County.

The Court must bear in mind that there was no sale of the abstract plant to the Commonwealth Company. The Commonwealth Company did not owe the T. I. & I. Company a dollar; received absolutely no consideration, except as above stated, for the execution of its contract of guaranty. This contract of guaranty, in other words, was simply a hiring of Smith and Willoughby to stay out of business in Pierce County, which is condemned by all the authorities, and is fully argued under the second sub-division of the first paragraph of this brief.

Can anyone say, after reading this record, that Smith and Willoughby did nothing but sell their plant? Can anyone say that they were not among the prime movers in the formation of this monopoly? Can anyone say that every transaction entered into between Smith and Willoughby and the other parties was not each one a transaction having for its purpose the formation of a monopoly ? Can any-

one say that the dominant purpose of all the parties to these different transactions was not the formation of a monopoly, and the restraint of trade and competition in the abstract business? It seems to us not.

TRENTON POTTERIES CASE.

Appellant's counsel in their brief rely largely on the case of *Trenton Potteries vs. Oliphant*, 68 N. J. Eq. 507, 43 Atl. 728, as authority in support of their contention, that even though all the transactions did produce, or tend to produce a monopoly, the various contracts should be upheld.

This case was a case where the Trenton Potteries Company was a corporation formed for the purpose of taking over the different pottery manufacturers in New Jersey, and elsewhere, and it did buy up the different pottery companies and formed a monopoly of the pottery business. Certain of the manufacturers who sold to the corporation, and agreed not to go into business again did start in business, and they were enjoined. It was contended that the transactions were void, as being in restraint of trade, and forming of a monopoly. The lower court held this to be true, and dismissed the bill.

(39 Atl. 923.)

The Supreme Court, however, reversed the decision of the lower court, and held the contracts enforceable in part, and used the language quoted on page 29 of appellant's brief:

“A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his business was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no such limitations. They would be applied to enforce such contracts notwithstanding the effect was to diminish, or even to exclude competition * * * It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time at least, destroy, competition. Contracts for such purchases cannot be refused enforcement.”

At the outset we desire to call the Court's attention to the expression of the Supreme Court of New Jersey in its opinion in this case on page 729, of 43 Atlantic, in which it says:

“But in the absence of *legislative restrictions*, if such could be imposed upon the acqui-

sition of such property, and its use when so acquired, courts could impose no limitations."

The State of New Jersey neither by constitutional provision nor legislative enactment prohibited monopolies, or prohibited corporations from buying up competing corporations and forming a trust or monopoly. In fact it was the home of all the big trusts and monopolies of the United States, and the Court on that same page recognized the liberal corporate authority given to corporations, where they use the following language:

"Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregation of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the

courts to pronounce acts done under legislative grant to be inimical to public policy.”

That case can hardly be held to be an authority in the State of Washington where the constitution in the most solemn manner prohibits monopolies. If a like provision to that of the State of Washington had been a part of the constitution or statute of New Jersey, that decision would never have been rendered. Aside from the constitutional provision of the State of Washington, its policy has never been so notoriously favorable to the organization of trusts and monopolies as the State of New Jersey. It is a significant fact that trusts and monopolies have been fostered to such an extent in New Jersey that President Wilson when governor of the State of New Jersey had acts passed greatly limiting the powers of corporations, and crippling the trusts and monopolies that had flourished in that state, and we opine that if this question should now come up before the Supreme Court of New Jersey a different decision would be rendered, because of “legislative restrictions.”

We submit, however, that aside from legislative or constitutional restrictions this case is opposed to the great weight of authority, and that under the common law contracts such as were made in the Pottery case, would not be upheld as being both in restraint of trade and competition and forming a monopoly, and for that reason against public policy.

We have heretofore cited the case of *Merchants Ice & Cold Storage Co. vs. Rohrman*, 30 L. R. A. (N. S.) 973, 128 S. W. 599. That decision was rendered by the Supreme Court of Kentucky in 1910, eleven years after the Trenton Pottery case, and in that case, after quoting the opinion of the Supreme Court of New Jersey in the Trenton Pottery case, uses the following language on page 981:

“And it must be admitted that this case fully sustains the contention of counsel, and if recognized as authority by the us would uphold the contract here sought to be enforced. But we cannot give our approval to the doctrine announced by the New Jersey court. It is not only entirely at variance with our public policy as often declared both by the legislative and judicial departments of the State, but is contrary to the great weight of authority. Indeed we have not found any case that goes so far in an effort to promote trusts and encourage monopolies; the true and prevailing doctrine on this case being well expressed by the Michigan Supreme Court in *Richardson vs. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102, where it is said: ‘Monopolies in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of

the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provision in several of our state Constitutions.

* * * It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment against it.' And by our Court in *Anderson vs. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670, where it is said: 'Rivalry is the life of trade; the thrift and welfare of the people depend upon it; monopoly is opposed to it all along the line; the accumulation of wealth out of the brow-sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift, and enterprise, among all the citizens of the commonwealth, and is opposed to monopolies and combinations because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to de-

stroy or impede free competition between the several lines of business engaged in utterly void.' ”

The principle we contend for is well illustrated in the case of *Harding vs. American Glucose Co.*, 182 Ill. 551, 74 Am. State Reports, 189. The facts in that case were, that a corporation was formed for the purpose of taking over all of the corporations engaged in the manufacture of glucose and grape sugar. Harding, a stockholder of the American Glucose Company brought suit in Illinois enjoining the American Glucose Company from selling to the new corporation. The Court granted the relief prayed for, enjoined the sale, and among other things said:

“The material consideration in the case of such combinations is, as a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time, if it sees fit to do so.

“It does not relieve the trust of its objectionable features that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors.”

In the note to the last cited case in the Am. State Reports the author on page 243 uses the following

language concerning the case of *Carter-Crume Co. vs. Peurrung*, 86 Federal, 439:

“But if each independent producer contracts to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade.”

He further says:

“The case of *Trenton Potteries Co. vs. Oliphant* (N. J.) 43 Atl. Rep. 723, if in harmony with American authority, must be sustained on this ground, if at all. The case, as first reported in 56 N. J. Eq. 680, 39 Atl. 923, is more in line with the general trend of courts’ decisions relative to trade combinations and trusts, and seems to be the better decision.”

The same author says on page 241, in reference to the case of *Oakdale Manufacturing Co. vs. Garst*, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784, and referred to on page 65 of appellant’s brief as follows:

“The mere consolidation of firms for the purpose of reducing competition between them is not illegal; *Oakdale Mfgr. Co. vs. Garst*, supra. * * * But this rule should not be carried to such an extent as to require the courts to assume to say how much competition is de-

sirable, as has been attempted in some cases. * * *

The only safe rule is that which we have already stated, viz., whether the purpose and natural consequence of the agreement tends to create a monopoly. * * * ”

As to the case of *Central Shade Roller Co. vs. Cushman*, 143 Mass. 353, cited in appellant's brief at page 68, the same author on page 246 says:

“In the opinion of the Court the fact that articles manufactured, glue and roller shades, were not necessities of life, was of considerable, if not controlling importance.”

And on page 261, the author says:

“The nearest approach to a case holding a combination of patent owners to be valid is *Central Shade Roller Company vs. Cushman*, 143 Mass. 353, which we have had occasion to cite elsewhere. *National Harrow Co. vs. Hench*, 76 Fed. 667, is a well considered case holding such a combination illegal.”

As was said by the Honorable Judge of the Lower Court, the question of whether an article is useful or necessary is eliminated, but monopolies in any commodity, whether useful and necessary or not, are prohibited.

The Trenton Potteries case is opposed to the principles as announced by Judge Taft in the

Addyston Pipe Case, 85 Fed. 271, wherein on page 291 he uses the following language:

“But in recent years, even the fact that the contract is one for the sale of property or of business and goodwill, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and goodwill, or the partnership agreement, is merely ancillary and subordinate to that purpose. The principal cases of this class are *Richardson vs. Buhl*, 77 Mich. 632; 43 N. W. 1102; *Arnot vs. Coal Co.*, 68 N. Y. 558; *People vs. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062; *People vs. Refining Co.*, 54 Hunn. 366, 7 N. Y. Supp. 406; *State vs. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *State vs. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279; *Manufacturing Co. vs. Klotz*, 44 Fed. 721; *Distilling & Cattle Feeding Company vs.*

People, 156 Ill. 448, 41 N. E. 188; *Carbon Co. vs. McMillan*, 119 N. Y. 46, 23 N. E. 530; *Harrow Co. vs. Hench*, 83 Fed. 36; *Factor Co. vs. Adler*, 90 Cal. 110, 27 Pac. 36; *Lumber Co. vs. Hayes*, 76 Cal. 387, 18 Pac. 391."

It will be noticed that Judge Taft cites above the case of *Richardson vs. Buhl*, 77 Mich. 632, 43 N. W. 1102, and in referring to that case the Supreme Court of Kentucky in the *Rohrman Case*, 30 L. R. A. (N. S.) 981, uses the following language:

"The true and prevailing doctrine on this subject being well expressed by the Michigan Supreme Court in *Richardson vs. Buhl*."

See also *Lufkin Rule Co. vs. Fringeli*. 57 Ohio St. 596, 49 N. E. 1030; 41 L. R. A. 185.

Anderson vs. Shawnee Compress Co., 17 Okla. 231; 87 Pac. 315; 15 L. R. A. (N. S.), 846 and Note.

Affirmed by the Supreme Court of the U. S. in 209 U. S. 423 (52 L. Ed. 865) and Note.

The Shawnee Compress case is a decision of the Supreme Court of the United States directly in conflict with the Trenton Potteries Case, and we believe that the Shawnee Compress Case will govern in the case at bar, particularly when we take into consideration

the fact that the policy of the State of Washington in regard to monopolies is directly opposed to the holding in the Potteries case.

The case of *Metcalf vs. American School Furniture Co.*, 122 Fed. 115, is cited by plaintiff in its brief on page 21 as supporting their contention. The decision in that case is based largely upon the decision in the Trenton Potteries Case, and must fall with it.

This case, however, can be distinguished both from the case at bar and the Trenton Potteries case. The Court uses on page 122 of the opinion the following language:

“Great stress is laid upon the point that the transfer of the goodwill and plant of the Buffalo Company is entirely separate and independent of any intention by the directors of the American Company to create a monopoly in restraint of trade. Careful consideration of the question here involved constrains me, though with hesitation, to accept this view of the transaction charged in the bill.”

In both the Trenton Potteries case and the case at bar all the parties knew of the purpose of the different transactions, that is, knew that it was for the purpose of monopolizing the business, and participated in all of the transactions which went to the forming of the monopoly.

The case of *Davis vs. Booth*, 131 Fed. 31, is also

cited by appellants as sustaining their contention. In that case the Court held that the stipulation not to go into business was valid, if it goes no farther than to support and protect the interests transferred by the contract of sale, and quote with approval Judge Taft's decision in the Addyston Pipe case.

The Court on page 38 of the opinion uses the following words:

"But referring again to the distinction already alluded to between an aggregation effected by purchase, and a combination of several owners to pool their business and eliminate competition, it is to be observed that in the present instance it appears that the purchase price paid to the Davis Fresh and Salt Fish Company consisted partly of cash and partly of stock in the corporation of A. Booth & Co., and that therefore the transaction was of a mixed character. This is an aspect of the case which has given us most concern, and in respect of which we are not aware of any decision precisely in point. We are unwilling to decide a matter of so much importance at this preliminary stage of the case, and especially so because no particular attention has been given to it in the briefs and argument of counsel. We purpose, therefore, to give such directions in regard to the continuance of the injunction as will preserve the rights of parties

from serious impairment in the interim, and reserve this and another question reserved in another part of this opinion until final hearing.”

As we have before shown the Addyston Pipe case lays down the principle that where a contract even though ancillary to some lawful act is one of a series of transactions, which have for their purpose the restraint of trade, or competition, or the monopolizing of business, or where the necessary result of such transaction will accomplish this, or tend to accomplish this purpose, is void as against public policy.

Appellants also cite in support of their contention the case of *Camors-McConnell Co. vs. McConnell*, 140 Fed. 412. The decision of the Circuit Court in this case was reversed by the Circuit Court of Appeals, in *McConnell vs. Camors-McConnell Co.* 152 Fed. 321, in which it was held that the contract in question was illegal.

In *Standard Furniture Co. vs. Van Alstine*, 22 Wash. 670, the vendor of furniture to be used in a house of prostitution gave a conditional sale, retained title and possession of the property used for the illegal purposes, and to that extent aided and participated in the conduct of the illegal business in which the purchaser was engaged, and the contract of sale there was held void.

So in the present case Smith and Willoughby aided and assisted in the formation of the monopoly,

and participated in it both by retaining joint possession of the T. I. & I. Company of Tacoma's plant, and also by boxing and shipping away the plant and retaining joint possession of it in Portland, Oregon, thus keeping it out of competition with the Commonwealth people.

Dougherty vs. Rice, 184 Fed. 878, cited by appellant, does not sustain appellant's contention, because the Court in that case held that if it should appear upon the trial that the transactions would tend to create a monopoly the Court would mould its decree to prevent the evil suggested.

The other cases cited by appellant do not sustain its contention, because none of the parties had anything to do with the illegal business itself; had simply knowledge of it, but in the case at bar Smith and Willoughby, the real plaintiffs, aided, participated, knew of and helped organize and carry on the monopolizing in the abstract business.

Contrary to the repeated statements of counsel for appellant in their brief that the holding of the Lower Court is opposed to the policy of the laws of the State of Washington concerning trusts, monopolies, contracts in restraint of trade and competition, we submit that the decisions of the Lower Court in this case follows strictly the policy of the commonwealth of Washington concerning these matters. Indeed, the Courts of the State are so jealous in protecting the rights of the people against

illegal contracts that in *Lewer vs. Cornelius*, 72 Wash. 124, it said:

“Under Rem. & Bal. Code, Sec. 6282, making it unlawful for a brewing company to pay, advance or loan or become surety for the payment of a retail liquor license, a promissory note by the retailer, payable to a bank, and delivered to a brewing company, which solicited from the bank a loan thereon to pay the retailer’s license fee, is void as against public policy and unenforceable, where the bank had notice of the purpose of the loan and made the same on the security of the brewing company with a view of assisting in the evasion of the statute.

The courts will refuse to enforce a contract entered into in violation of a statute and against public policy, without regard to the manner in which the illegality is disclosed, and will start an inquiry of its own regardless of the technical accuracy of the pleadings or the admissibility of evidence disclosing the illegality, to the end that neither party be given any aid in illegal proceedings.”

We respectfully submit that the argument and authorities cited by appellant do not meet the situation framed by all the parties here in the transactions of 1909 and 1911.

There is no question but that if one sells his business to another he may legally contract not to en-

gage in business for a limited period, and within a limited territory. That is all that is held in the case of *Washington Charcrete Company vs. Campbell*, 72 Wash. 566, quoted on page 24 of plaintiff's brief, but as was said by Judge Taft in the Addyston Pipe Case, a contract of this kind will not be upheld when it is one of a series of transactions, which have for their purpose the restraint of trade or competition, or the monopolizing of business, or where the necessary result of such transaction will accomplish or tend to accomplish this purpose, and no authority has, or can be cited that does uphold a contract burdened with the latter results.

Appellant also cites the case of *Oregon Steam Navigation Co. vs. Winsor*, 20 Wallace 64, 22 L. Ed. 315. The Supreme Court of the United States in that case held:

"An agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it is not unreasonable, and there is a consideration to support it."

An agreement that a steamer should not be used in the waters of a State for a fixed period, held legal."

The facts in that case were that the California Steam Navigation Company sold to the plaintiff, being a company engaged in like business on the Columbia river, the steamer *New World*, for Seventy-five Thousand Dollars, and as a part of the

purchase and sale the plaintiff stipulated that he would not run or employ, or suffer to be run, or employed, the steamer upon any of the routes of travel, rivers, bays or waters of the State of California, for the period of ten years from the first day of May, 1864; that on the 18th day of February, 1867, the plaintiff sold the same steamer to certain of the defendants, for the sum of Seventy-five Thousand Dollars, subject to a stipulation and covenant that the said steamer should not run or be employed upon any of the routes of travel, or the rivers, bays or waters of the State of California or the Columbia River, for a period of ten years from the first day of May, 1867. The Court held that the agreement made at the time of the first sale to refrain from operating the boat was legal, and a good consideration for it, but that the second agreement, being for three years longer than the first agreement, was void as to three years, as being without consideration.

In *Grenada Lumber Co. vs. Mississippi*, 217 U. S. 433 (54 L. Ed. 826), the defense was that the parties did not intend to restrain trade or competition by their contract, but the Court held:

“That such an agreement is in restraint of trade, is undeniable, whatever the motive or necessity which so induced the compact.”

Appellant's contention that the transaction of 1911 was simply a rearrangement of the securities is, under the evidence in this case, absolutely with-

out foundation. Appellant says in its brief, page 40, that there was some kind of an arrangement in 1909 by which the Smith and Willoughby interests were not to enter into the abstract business. That, together with the transactions which took place then, as hereinbefore recited, made a monopoly of the abstract business in Pierce County. Then in 1911, as a part of the transactions between the Smith and Willoughby interests and the Commonwealth Company and the T. I. & I. Company of Tacoma, we find Smith and Willoughby making a written agreement not to enter into the abstract business in Pierce County. The appellant contends that this was not part of the transaction of 1911, but was an afterthought and executed afterward, but the Lower Court in its findings (Record, p. 161-162), finds that it was part and parcel of those transactions and contemplated by the parties, and was so understood by them. How could the execution of this agreement be a part of the readjustment of their indebtedness and security? The entering into that agreement by Smith and Willoughby, the boxing up and sending the abstract plant to Portland, and removing it from competition, and removing the danger of it coming in competition, all of which was participated in, aided and abetted by Smith and Willoughby, can only be construed as being a part and parcel of further solidifying the monopoly in the abstract business in Pierce County already existing.

RULE OF REASON.

Appellant invokes the "rule of reason" doctrine to sustain its position. On page 43 counsel for appellant cite the case of *National Enameling Co. vs. Haberman*, 120 Federal 415, as being decided on the "rule of reason" theory. We submit that appellant can get little consolation out of that case, for it simply holds:

"A restrictive covenant, made by one capable of contracting, which is unlimited as to time, in area covers the entire United States, is ancillary to the main lawful contract (being in part consideration of the payment for goodwill sold), and is reasonable and no broader than is necessary to save to the covenantee the rights and privileges for which he has paid, may be enforced."

The appellant on page 43 also cites 9 Cyc. 529, as a good expression of the "rule of reason" theory. Apply the rule as expressed in Cyc. to the evidence in the case at bar, and no recovery can be had.

Again on page 61 of its brief appellant cites the case of *Fisher Flouring Co. vs. Swanson*, 76 Washington 649, as sustaining this "rule of reason," but we maintain that that case sustains our position. We have referred to this case before in our brief, but feel constrained, on account of the reliance upon it by appellant, to quote from the opinion in that case (Op. p. 654)

“And again when the contract fixing the price is not ancillary to some main lawful contract, the sole object of the contract is to restrain competition and enhance prices, and its only tendency is to control the market. It is therefore invalid because of this tendency, without reference to its reasonableness in other particulars. In such a case, there is no main lawful purpose to subserve which partial restraint is permissible, hence nothing by which to measure the reasonableness of the restraint. Its only measurable tendency would be to create a monopoly. Such a contract is therefore invalid. *United States vs. Addyston Pipe & Steel Co.*, 85 Fed. 271; *State vs. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260.”

Then again on page 656:

“The foregoing authorities make it clear that the courts now generally recognize, as the basis of the rule of public policy against restraints on competition, the tendency to create a monopoly. It is manifest that a restriction of competition between the owners of an insignificant part of the entire supply of a given commodity in a given community could not create a monopoly nor injuriously affect the public. It is equally clear that the restriction need not be a complete restriction covering the entire supply of a given commodity in order

to injuriously affect the public, but, unless it be held that every restriction is *per se* illegal, where are we to draw the line? Obviously, the answer must be found in the facts of each particular case. If, considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control. Wherever, therefore, there exists a monopoly or combination, or the contract creates or tends to create a monopoly or such approximation to monopoly as to practically bar others from entering the field by the chance of failure, a contract fixing retail prices is void as essentially injurious to the public."

Appellant maintains that the rule in the Fisher Flouring case is substantially as follows:

"Contracts incidental to some main contract, not proceeding from or tending to create and maintain a monopoly, will be maintained when the restriction is, under the circumstances of

the particular case, reasonable in reference to the interests of the parties and of the public."

(Appellant's brief, p. 61).

Applying this rule to the case at bar no recovery could be had.

The opinion in the case of *Gross, Kelly & Co. vs. Bibo*, 145 Pacific 480, cited supra, settles the contention, it seems to us, that the "rule of reason" theory will not aid appellant any in this action.

In that case, on page 491 of the opinion, the Court uses the following language:

"If the 'rule of reason' be applied to this contract, it will not help appellant. Under this doctrine, which was firmly established by the Standard Oil Case, contracts in restraint of trade which are unreasonable are invalid. While originally, at common law, all contracts in restraint of trade were presumptively invalid (*Mitchel vs. Reynolds*, 1 P. Wms. 181), because such contracts were deemed injurious to the public as well as to the individuals who made them, 'in the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void; that is to say, if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid.' *Standard Oil*

Co. vs. U. S., supra. It is the purpose of the contract which makes it reasonable or unreasonable, coupled, of course, with the limitations put upon the right to engage in business. If the restrictions are no broader than are necessary to protect the party in the enjoyment of the benefits of the main contract, to which the restraint is incidental, the contract would be upheld as valid, because reasonable. On the other hand, if the restrictions are so broad that it necessarily appears that the restraint is unreasonable, the contract would be held to be illegal."

The Lower Court recognized the principles contended for by appellees, and on this branch of the case in his opinion uses the following language:

"When the Commonwealth Company came into these transactions the business of the T. I. & I. Company of Tacoma was in a failing condition, the only consideration to the Commonwealth Company being that it gave it a monopoly by excluding both the T. I. & I. Company of Tacoma, and the T. I. & I. Company of Washington, as well as Smith and Willoughby from the abstract business in Pierce County. In so far as Smith and Willoughby were concerned, they were not therefore expressly excluded from competing with the Commonwealth Company. If it be conceded that the agreements not to compete were, so

far as the T. I. & I. Company was concerned, incidental to the sale, it cannot be so considered when regarding them as transactions with the Commonwealth Company, because that which one company—the T. I. & I. Company got—the other company—the Commonwealth Company—did not get. It by no means follows that because such an arrangement would be considered a lawful incident to the sale of a profitable business, that it would be so considered in the case of a sale of a business which all recognized as running at a loss. In the first instance, the law in its indulgence, would attribute only lawful motives, unless compelled to do otherwise, but under the latter circumstances, reason cannot but reject the contention. The foundation of the exception to the rule against any restraint of trade and commerce is that the law never presumes wrong to be done, or a wrongful purpose; that a wrongful purpose and an act to effect such purposes are necessary to defeat a contract between competent parties; that as long as acts are only such as are reasonably necessary to effect a sale of property, an unlawful purpose will not be imputed, although the effect is, in respect to competition, injurious, but the purpose will be presumed to be merely the disposing of his property by the owner, a right of the highest character, not to be lightly impeded. But, if the seller actually

enters into the machinations of the buyer, outside of what is reasonably necessary to the sale of his own, and assists thereby in the stifling of competition or in forming a monopoly, a purpose to injure the public will be attributed to the seller in spite of his right to sell that which is his own.

What incentive or motive was there to buy a business that was running behind, and lock its plant up for 36 years, if it were not to eliminate all competition. If it cannot be fairly said that the obligee's purpose was to buy, how, without a paradox, can it be said, when they were acting in full accord, that the promisor's purpose was to sell. Under the circumstances it could not be said that the goodwill of the business of the T. I. & I. Company of Tacoma was preserved and passed to the Commonwealth Company, because there was no merger in any way of the business of the two companies. They had been kept entirely separate so far as the public was concerned until this arrangement was made, when the former company abruptly terminated its activities, and, so far as the goodwill of its business was concerned, it was simply cast adrift.

Under the contract of 1909, possession was immediately taken of the plant by the buyer, subject to partial control on the part of the seller, and competition for the future was eliminated, but under the agreement of 1911,

competition was entirely annihilated, and the delivery of possession of the property postponed for 36 years. The limited span of man's life cannot help but affect his interest and purpose in all his actions. The immediate is of more consequence to him than the remote. Under the first contract it might be plausibly contended that the main purpose was to sell, and that the elimination of competition was incident to the sale, but under the latter transaction it is clear, that, the sale of the property, the transfer of possession, being deferred for thirty-six years, two generations, the main, well nigh the entire purpose, was the elimination of competition, and the transfer of the property was merely incidental. Beyond his grandchildren a man is not hardly concerned for making provision for his descendants. It is contended that this was merely a sale, and that while the seller might have knowledge of defendant's purpose to form a monopoly, yet it was in no sense the seller's purpose, and that if the seller's act tended to assist in the buyer's purpose, yet it was only such assistance as was necessarily incident to the making of the sale of its property, which it had a right to do. This contention would be more plausible were it not for the fact that, simultaneously with the sale, Mr. Willoughby, manager of the T. I. & I. Company of Washington, assisted the buyers in securing con-

trol, by a five-year lease and option to purchase, of the only other competing company, the Wilson Company, by the terms of which the lessor was to remain in possession, that is, its plant was not to be operated, that is for a monthly rental which was paid to keep it out of business. By assisting in this transaction, the seller departed from what was reasonably necessary in making a sale of its property, and knowingly assisted the buyer in its purpose to effect a monopoly.

It is true that the services of Willoughby in securing the Wilson lease, was no part of the express consideration for the mortgage of 1909. In this sense it is a collateral matter, but in view of all the evidence it is clear that it was all a part of one transaction, and that it was well understood that complete control, that is, monopoly, of the abstract business was to be acquired by securing both the independent plants, with the incidental power to fix and control prices and output. *U. S. vs. Addyston Pipe & Steel Company*, 85 Fed. 271.

This is considered sufficient to render the 1909 contract invalid, without considering the effect of the control in the buying corporation retained by the seller, nor the extent of the latter's interest therein, having a \$90,000.00 mortgage on property sold for \$100,000.00 to a corporation with a \$5,000.00 capital stock,

upon the interest of the seller, or its responsibility for conduct of the buying corporation.

It may be said that it was reasonable for Smith and Willoughby, and the selling corporation, to contract not to re-enter the abstract business in Pierce County as a part of the sale. If skilled in their calling all the rest of the world remained open to them, and the public would not be likely to suffer from their enforced idleness, but the locking up, for 36 years, of the valuable abstract plant and the abstract books of the T. I. & I. Company of Tacoma, whose only possible use was in the abstract business in Pierce County, deprives the country of a valuable industrial agency in which the public has an undoubted interest. This qualification is recognized by the Supreme Court in *Oregon Steam Navigation Company vs. Winsor*, 87 U. S. 64.

In case of bad market conditions, the closing, by agreement, of a plant for a limited time, that is, such time as such conditions might reasonably be expected to continue, might not be unlawful, but 36 years is far in excess of any such reasonable time. In *Olin vs. Gilmore*, 25 Fed. 562, where the agreed term was five years and the articles not to be manufactured were two kinds of hinges, the agreement was held to be invalid.

Prior to the agreement of December, 1911,

in July of that year, one of the Foggs wrote to Willoughby in part as follows:

'The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will give us your share of help, we will still try to pull the thing out O. K., as almost any revenue derived will be more than could be had by fighting him and each other too. After considering a good many plans, this one seems to be the best.

That is, to increase the capital stock of our company to four hundred thousand dollars, give you \$80,000 and Wilson \$38,000, preferred stock at 5 per cent., in exchange for your plants, then operate only our plant, and as soon as the amount of work increases any, to cut the rate to seventy-five cents, and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done, and we would make more money for us all by operating one plant at reduced rates, than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low abstract rates will keep out competition better than several com-

panies at higher rates would do. At a dollar, the new man would make a little profit on each order, but at seventy-five cents he would lose a little on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent profit. We could do it because our plant is so complete and we have such a large amount of stock on hand.'

While the proposition made in this letter was not accomplished in its entirety, it was not rejected on account of the proposition to crush the new competitor by cutting prices. In fact a little later Mr. Willoughby writes Mr. Fogg as follows:

'Your letter of August Third relative to the abstract situation at Tacoma has been received.

We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition where by we would be a minority stockholder and therefore have nothing to say in the management of the company.'

Later in December the arrangement now in question in this suit, was made. It relieved the defendants of the expense of maintaining two abstract companies, and left them free to

suppress this new competitor, as so frankly proposed by Mr. Fogg in his letter to Mr. Willoughby. Although the cutting of prices generally would be of benefit to the public, yet cut-throat competition such as that proposed, and evidently acceded to, for its own benefit, by the plaintiff, the object of which was to eliminate a competitor by selling without regard to a fair profit, for the sole and express purpose of crushing him, to recoup later from the public, is itself unfair competition. *People vs. Dwyer*, 145 N. Y. Supp. 748, affirmed 150 N. Y. App. Div., 542, further affirmed 215 N. Y. 48; *U. S. vs. Great Lakes Towing Company*, 217 Fed. 656, 659, 661; Report of Comm. of Corp., March, 1915—see Trust Laws and Unfair Competition, p. 305, et seq., 463 et seq., 479 et seq.

For all of the foregoing reasons it is considered that both the contract of 1909, and those of 1911, are invalid as being unduly and unreasonably in restraint of trade and competition.

If, as has been held under the Sherman Anti-Trust Law, there may be lawfully a reasonable restraint of trade and commerce, the converse would appear to be that such right carried with it a correlated duty that such restraint should not be unreasonably unrestrained. Such, it is considered, would be a campaign of price cutting such as impliedly

agreed to herein, for such would be well calculated in itself, in the end, to unduly restrain trade by driving the men of lesser financial resources, though of equal skill and efficiency, from the field, and, through fear, keeping them from entering it.

Having reached this conclusion, it follows, the pledge of the abstract plant becomes incident to the notes now held to be invalid. The pledge is therefore likewise held to be invalid."

(Opinion, Record pp. 173-174-175-176-177-178-179-180.)

FIFTH.

It must be apparent to any unprejudiced mind, after reading the record in this case that the opinion of the lower court, and the judgment based thereon, declaring all the contracts of 1909 and 1911 void and unenforceable as being in restraint of trade and competition, tending to form a monopoly, and as being within the inhibition of the constitutional provisions of the State of Washington above cited, must be affirmed, and that it would be an imposition upon the time of this honorable Court to refer at any length.

1. To the partial defense of the T. I. & I. Company that this action was prematurely brought, and,

2. To the partial defense of the Commonwealth Company, found on page 48 of the Record, that

the provision in the agreement executed by the Commonwealth Company, as set forth on said page 48, and the demand of plaintiff thereunder are unconscionable and inequitable, and in the nature of a penalty, and not enforceable in a court of equity.

I.

In regard to the defense of the T. I. & I. Company of Tacoma that the action was prematurely brought, we will simply say that the mortgage of the T. I. & I. Company of Tacoma provides that no action should be commenced thereon until the T. I. & I. Company of Tacoma has been in default in the payment of any installment of principal for one year, and not then until ninety days' notice of such default had been given to the T. I. & I. Company, after the expiration of said one year. An installment of principal of was due December 2, 1915, and would be in default December 2, 1916, so that no action could be maintained on the notes or mortgage of the T. I. & I. Company of Tacoma until ninety days after December 2nd, 1916; this action was commenced February 8th, 1916, seeking a foreclosure of the mortgage or pledge, attached to the complaint marked "Exhibit A," and such action could not have been commenced, under the terms of the mortgage, until March 2nd, 1916.

Appellant attempts to avoid this contention by claiming that the inconsistency between the notes

and mortgage were the fault of the scrivener. The Lower Court in passing upon this, we think, effectually settled this proposition in favor of the contention of appellees.

(See Opinion, Record, pp. 168-169-170-171.)

II.

Under the authority of *Cissna Loan Company vs. Gawley*, 87 Washington 438, and other Washington cases, and *Chicago House Wrecking vs. United States*, 106 Federal 389; *Pomeroy Equity Jurisprudence*, Vol. 1, Sec. 441, et seq.; 13 Cyc. 101; *Parsons on Contracts*, 9 Ed., Vol. 3, p. 174, the contention of appellees, as set forth in the answer of Commonwealth Company above referred to, is that the interest provided for in said contract not yet due is in the nature of a penalty, in that it demands the payment of a larger sum of money for the mere failure of payment of a smaller sum, and cannot be recovered. Many other cases can be cited to the same effect, but as before stated, we are so confident that the judgment and decree of the Lower Court must be affirmed, that we do not believe this Court will ever arrive at the point of considering these partial defenses.

CONCLUSION.

Counsel for appellees realize the fact that they have given the issues involved in this case a very extended discussion, but have felt that the import-

ance of the case would excuse them if this Honorable Court should feel as if they have trespassed upon the time and attention of the Court in this regard.

We submit that counsel for appellant in their brief have attempted to evade the well known principles regarding contracts in restraint of trade and competition, and the well known principle regarding monopolies, but have wholly failed to advance any argument or authority sufficient to entitle appellant to **any** relief.

We earnestly contend that taking all the transactions from 1909 down to 1911, that it was the dominant purpose of all the parties interested to form a monopoly of the abstract business in Pierce County; that Smith and Willoughby assisted in forming the same, participated in it, and were benefitted by it; that all of the contracts entered into were entered into in furtherance of this idea. That all of the contracts are void as against public policy, being in restraint of trade and competition, and tended to form a monopoly. That the contract of guaranty of the Commonwealth Company is void for the same reason, and is furthermore void as being prohibited by the constitutional provisions above referred to. That the individual contracts of guaranty cannot be maintained, because of the illegality with which the principal contract is tainted, which taint follows and attaches to the individual contracts of guaranty.

Appellant's counsel in the trial of the case introduced evidence tending to show that the Fogg and Gove interests subsequent to December 2nd, 1911, did not succeed in maintaining a complete monopoly. We objected to the introduction of the evidence at that time as being immaterial and irrelevant, and we respectfully submit that this objection should have been sustained, because all of the authorities hold that if the transactions tended to produce a monopoly, and the transactions were entered into for the purpose of producing a monopoly, it is immaterial whether subsequently they succeeded in maintaining that monopoly. It is immaterial whether the output was reduced; whether the prices were raised. If the power was given to the monopoly to do this thing the evil was accomplished.

Appellant in its brief on page 22, uses the following language:

"It is a curious principle of law which permits monopolists whose plans have gone astray, to avoid the obligation of their contracts by pleading their unlawful designs. Particularly is this so when the anticipated plunder would have been theirs alone."

What are the facts in regard to the plunder? The decree of the lower court awarded to appellant the abstract plant, which was boxed up in Portland, enhanced in value as it had been by a valuable set of records donated to it by the Commonwealth

Company, and, in addition, according to the undisputed testimony of Mr. Fogg (Record, p. 131), Smith and Willoughby had received Forty-two Thousand Dollars in cash.

Curious as this principle of law may seem to appellant, as was said in *Davis vs. Southern Pacific Co.*, 235 Federal 731, the Court will leave the parties where it finds them, and is compelled in obedience to the positive mandate of the law to send plaintiffs forth the victims of their own indiscretion and indulgence. To adjudge appellant entitled to recover would enforce a contract which the Court holds unlawful and unenforceable.

The rules in regard to participating in the formation of a monopoly in the State of Washington are set forth in the authorities cited in this brief, and he who seeks to deviate therefrom does so at his own risk, and cannot expect the courts to recoup him any loss he may sustain thereby, or to grant him any relief.

The defenses interposed by the appellees have been criticized at times, and in one case referred to as dishonest defenses. *McMullin vs. Hoffman*, 175 U. S. 639, 654 and 669. It was for the purpose of showing fully to the Court the attitude of the appellees in this case, and the attitude of the appellees during all the time covered by the various transactions, the appellees while being advised by counsel that these agreements were all illegal and

could not be recovered under, still, for the purpose of playing fair, offered the appellant, as shown by the testimony, liberal concessions, but the appellant refused all of these offers, and demanded "its pound of flesh," and the appellees feel that now they are justified in standing upon the strict letter of the law, and have no hesitancy in setting up and asserting the illegality and non-enforceability of all of said mortgages, pledge, agreements and other arrangements.

There is no reason why the rules of law above cited should not be applied in the case at bar. The real plaintiffs in this action, Willoughby and Smith, were original parties to all the transactions, and the various agreements were made with the common intent on the part of the several plaintiffs and defendants to protect their individual interests in the two abstract plants in Tacoma. Appellants have received upwards of Forty-two Thousand Dollars in cash on the various contracts. This was more than the law would give. The cases all hold that the court will not enforce the agreements, but will leave the parties where it finds them.

This is exactly what the lower court did, and we respectfully submit that its judgment and decree should be affirmed.

CHARLES O. BATES,
CHARLES T. PETERSON,
EDWARD FOGG,

Solicitors for Appellees.

No. 3013

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LUMBERMEN'S TRUST COMPANY, trustee,

Appellant,

VS

TITLE INSURANCE & INVESTMENT COMPANY OF
TACOMA (a corporation), COMMONWEALTH TITLE
TRUST COMPANY (a corporation), HORACE FOGG,
FRED S. FOGG, HERBERT GOVE and ALVA FOGG,
administratrix of the estate of Franklin Fogg,
deceased,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

CHARLES O. BATES,

CHARLES T. PETERSON,

EDWARD FOGG,

*Solicitors for Appellees
and Petitioners.*

FILED
FEB 2 1918

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APPELLEES' PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Comes now the above named appellees, and respectfully petition this Honorable Court for a rehearing of this cause, for the following reasons:

FIRST.

At the outset, there are certain rules of law, which we presume may be regarded as settled.

I.

The provisions of the Constitution of the State of Washington, and the decisions of the Washington Supreme Court thereon, are the law of this case, and are binding on the federal courts.

Northern Pacific Ry. v. Meese, 239 U. S. 619;
C. M. & St. P. Ry. v. Minnesota, 134 U. S. 418;
Sioux City Co. v. Trust Co., 173 U. S. 107;
National Cotton Oil Co. v. Texas, 197 U. S. 130.

II.

The same is true of the decisions of the Supreme Court of Washington, as to questions of local law, and the public policy of the State of Washington.

City of Detroit v. Osborne, 135 U. S. 497;
Hartford Fire Ins. Co. v. C. M. & St. P. Ry.,
 175 U. S. 108.

III.

Even in cases involving questions of general law, as distinguished from questions of purely local law, or the public policy of the particular state, the federal courts, for the sake of harmony, and to avoid confusion, will lean towards an agreement of views with the state courts, if the question is balanced with doubt.

Sim v. Edenborn, 242 U. S. 135.

IV.

As to decisions of the trial court on questions of fact, we understand the rule of this court to be that the decision of the trial court as to the questions of

fact will not be disturbed by this court, unless this court finds them to be “contrary to the decided weight of the testimony”.

Leggat v. McLure, 234 Fed. 621;

Tobey v. Kilbourne, 222 Fed. 763;

Thorndyke v. Alaska Perseverance Co., 164 Fed. 665;

Moore v. Moore, 121 Fed. 737;

Tate v. Holmes, 76 Fed. 667.

SECOND.

THE DECISION OF THIS COURT IS IN CONFLICT WITH ARTICLE XII, SECTION 22, OF THE CONSTITUTION OF THE STATE OF WASHINGTON, BEING THE PROVISION AGAINST MONOPOLIES, AND AGAINST AGREEMENTS AND COMBINATIONS FOR THE PURPOSE OF FIXING PRICES, AND IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE STATE OF WASHINGTON THEREUNDER.

I.

Article XII, Section 22, of the Washington Constitution, is as follows:

“Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association or persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of

this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

A further constitutional provision applicable here, showing that the above provision, in its prohibitive features, is self-executing, is Article I, Section 29, as follows:

"The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise."

II.

The decisions of the Washington Supreme Court construing these provisions of the Constitution are:

Wood v. Seattle, 23 Wash. 21, in which the court says:

"The prohibition is directed against combinations between corporations, companies, or individuals, made 'for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity', and it is combinations of this character and for these purposes that constitute the monopolies and trusts which the constitution interdicts."

And *Matson v. Hunt*, 82 Wash. 294, in which the court says:

"The court instructed the jury that the contract was in violation of Article 12, Section 22 of the constitution. This provision of the constitution is as follows:

'Monopolies and Trusts.—Monopolies and trusts shall never be allowed in this state, and no incorporated company * * * in this state shall directly or indirectly combine or make any contract with any other incorporated company * * * for the purpose of fixing the price or limiting the

production or regulating the transportation of any product or commodity.'

It is argued by the appellant that the court erred in instructing the jury that this contract was in violation of this provision of the constitution. *California Steam Nav. Co. v. Wright*, 6 Cal. 258, is cited in support of the contention that this contract does not violate this provision of the constitution. The California cases cited were decided under the common law. It does not appear that California at that time had a constitution the same as ours. We are satisfied that our constitution in the section quoted prohibits contracts which provide for monopolies regulating the transportation of any product or commodity."

III.

In defining a monopoly under the laws of Washington, the Washington Supreme Court, in *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 657, lays down the rule as to what constitutes a monopoly, as follows:

"The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. *Noyes, Intercorporate Relations* (2d Ed.), Sec. 357.

Since limitations of time and space do not serve as the test of the validity of contracts in restraint of competition, the test must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy. If it does not have that tendency, it is not. In applying this test, the public interest is always the first and controlling consideration. A contract or combination creating a general, that is to say, complete restraint or restriction, however slight, within a given market, is essentially invalid because it must either result from, or tend to produce, a

monopoly. Its inevitable tendency is to destroy competition. Under an economic system founded upon competition, every general restriction, that is, every restriction covering all or a controlling fraction of a given commodity, is essentially unreasonable.

If considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control."

THIRD.

THE COURT ERRED IN FINDING AND DECIDING THAT THE ABSTRACT BUSINESS IN PIERCE COUNTY COULD NOT BE MONOPOLIZED.

In view of the fact that this court fails to mention, or give any consideration to the fact agreed between the parties that prior to 1909 the three abstract companies were doing all of the abstract business in Pierce County, and fails to mention, or give any effect to the testimony of O. M. Smith, one of the plaintiffs, and the uncontradicted testimony of all the witnesses for the defendants, including four County Auditors, to the effect that it was impossible for the County Auditor to make an abstract of title, because he had no tract index, and in view of the fact that this court assumes and states as the basis of its opinion that there could not be a monopoly in the abstract business, because it

says anyone could make abstracts from the public records, it is apparent that this court entirely misunderstood the nature of the abstract business in Pierce County.

This court may have been misled by the fact that in some of the Pacific Coast States, particularly in Oregon, the public records are so kept that a private individual, without any abstract plant, can make abstracts, and that in Oregon, particularly in Portland, there are a considerable number of what may be called "curbstone" abstractors, in addition to the regular abstract companies.

This court also lost sight of the fact that all parties to this action stipulated that the abstract business in Pierce County was transacted exclusively by abstract companies.

See Stipulated Fact No. 2 (Record, p. 76), as follows:

"Prior to December 7th, 1909, the aforesaid companies had carried on business in active and actual competition with each other, and for many years prior to said date said companies owned and controlled the only abstract plants in said county, and transacted all of the abstract business therein."

And that O. M. Smith, one of the plaintiffs, and numerous witnesses for the defendants, including four County Auditors, all testified that it was necessary to have a tract index to do an abstract business, or to make an abstract, and that the County Auditor had no such tract indexes. Not only is this the case, but

County Auditors are prohibited by law in the State of Washington from making or keeping such tract indexes.

Dirks v. Collins, 37 Wash. 621, where the court said:

“This action was brought by a taxpayer to enjoin the respondents, as county officers of Spokane County, from keeping in the auditor’s office, at public expense, a set of books known as “tract indices”, upon the ground that such books were not authorized by law. Upon the trial of the case the court below found that the county auditor kept and maintained such a set of books at public expense, but also found that such books were a public utility, and that this abolishment would make more expense to the county than the maintenance of the books. The court therefore concluded that the maintenance of the tract indices is not an injury to the appellant, and dismissed the action. The appeal is from this order.

In the case of *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195, where a contract (for \$22,500) had been entered into by the board of county commissioners of Pierce County for the preparation of tract indices such as the ones kept by Spokane County, now in question, we held that the county board had no authority to enter into such a contract, because the Legislature had provided for the kind of indices to be kept by the county auditor in his office, and there was no authority for a different method to be prepared or kept at public expense. In the course of that opinion, speaking to this point, we said at page 635 of 27 Wash., page 199 of 68 Pac.:

‘It is not reasonable to suppose that when the Legislature so carefully described the system that should be followed by county auditors, and which should be uniform throughout the state, it at the same time intended to authorize county commissioners to expend large sums to maintain other and different systems. The fact that a certain mode or method has been expressly designated by

the Legislature, we think, excludes the idea that a different mode or method may be pursued. The Legislature has not only prescribed the method, but has expressly made it the duty of the county auditor to follow it; and this, we think, negatives the idea that another method may be pursued at public expense by authority of the county commissioners. The new method may be more convenient and more in accordance with the enlightenment and enterprise of the times, but, until the Legislature has authorized its adoption, and conferred upon county commissioners the power to expend public money for that purpose, we think it must be held that it is beyond their power to so expend the county's funds.'

We think that case is conclusive of the question presented on this appeal.

"Counsel for respondents contend, however, that under the provisions of sections 417, 418, 1 Ballinger's Ann. Codes & St., (being Section 8792 of R. & B. Code, cited on page 21 of appellant's brief), which are as follows: (Quoting the statute).

"We think the sections above quoted were not intended to make the county auditors public abstracters, to the extent of requiring them to make a complete list of all liens and all transfers affecting particular pieces of land upon demand therefor, but, rather, were intended to require the auditor to search for certain instruments to which his attention is specifically directed by the applicant, and, if such instruments are recorded or filed in his office, to certify as provided in section 417."

This testimony, and this decision of the State Supreme Court demonstrates that this court was in error in assuming that the abstract business in Pierce County could not be monopolized, for the alleged reason that anyone could make abstracts, simply because the public records are open to the inspection of all.

FOURTH.

IT IS APPARENT FROM THE OPINION OF THIS COURT THAT IT OVERLOOKED AND FAILED TO CONSIDER CERTAIN MATERIAL EVIDENCE, THE CONSIDERATION OF WHICH IN CONNECTION WITH THE OTHER FACTS OF THE CASE WILL RESULT IN AN AFFIRMANCE OF THE JUDGMENT OF THE TRIAL COURT.

I.

Aside from the court's apparent misunderstanding of the nature of the abstract business in Pierce County, there is little difference between the findings of the trial court, and the findings of this court, as to many of the facts of the case, but in certain controlling particulars this court has overlooked and failed to give effect to certain evidence appearing in the record.

In order that the court may have the facts in mind, we request the court to again read the agreed statement of facts found on pages 75 to 83 of the Transcript, and the testimony of O. M. Smith, on page 116, the testimony of Horace Fogg, on pages 119, 120 and 123, the testimony of Fred S. Fogg, on pages 129, 131, 133 and 134, the testimony of Franklin Fogg on page 137, and the testimony of the four County Auditors of Pierce County, Washington, on pages 138 to 140 of the Transcript.

In its statement of the case, this court wholly failed to mention, or to give effect to the last sentence in Agreed Fact No. 2 (Trans. p. 76), to the effect that prior to December 7th, 1909, the three abstract companies "owned and controlled the only abstract plants

in said county, *and transacted all of the abstract business therein.*”

The court further failed to mention or give effect to the testimony of plaintiff's witness Smith, as follows:

“The first thing that a company has to do in order to render that service in the conduct of its business, is to have a tract index showing all of the instruments affecting any particular piece of property in a county. Second: To have a name index. It should show everything that may in any way, affect real property that does not contain a description of land, such as judgments, personal judgment, attachments, etc. Everything you would want to complete a chain of title”,

and to the uncontradicted testimony of the Foggs, and of the four County Auditors, found on the pages above referred to, that on account of the nature of the abstract business in Pierce County, and on account of the way the auditor's records are kept in Pierce County, the Auditor did not make abstracts, and that it was absolutely impossible for anyone to make abstracts, without an abstract plant, and that it is a physical impossibility for the County Auditor in Pierce County to make a reliable abstract, and that unless an abstract of property in Pierce County was made by one of the abstract companies equipped for the purpose of making abstracts, it would not be accepted in the ordinary course of business, and the testimony of Horace Fogg, that in the fifteen years he had been in the abstract business he had never heard of an abstract being made by the Auditor.

The court further failed to give effect to the fact that the Commonwealth Company had absolutely noth-

ing whatever to do with any of the transactions prior to the execution of its written guaranty in December, 1911, and had nothing whatever to do with the transactions of 1909.

The court failed to mention, or give effect to the uncontradicted testimony, as shown on pages 129, 130, 131, 133, 134 and 137, of the Transcript, to the effect that the only consideration flowing to the Commonwealth Company for the execution of the guaranty agreement, was the shipment of the plant of the Tacoma Company to Portland, thus getting it out of the way, and avoiding the possibility of that plant falling into hostile hands through a foreclosure of the 1909 mortgage, and the agreement on the part of Smith and Willoughby to stay out of the abstract business in Pierce County for a period of thirty-six years.

This court failed to consider the fact that the agreements of 1911, including the guaranty of the Commonwealth Company, resulting in the shipment of the Tacoma plant to Portland to be kept in a vault for thirty-six years, and thus eliminating it from competition, and the agreement on the part of Smith and Willoughby to keep out of the abstract business in Pierce County, were not connected with any sale.

This court further failed to mention, or give effect to the uncontradicted testimony of all of the Foggs that the actual purpose of all of the transactions of 1909 and 1911, was to form and maintain a monopoly of the abstract business and to do away with the price-cutting of abstracts in Pierce County, and that the lease of the Wilson plant, and the sale of the Wil-

loughby plant to a specially organized five thousand dollar corporation, where there was no further liability of any nature on the part of its stockholders, were simply a means to an end intended to be accomplished.

This court in its opinion failed to mention, and apparently failed to give consideration, to the avowed purpose of the parties in making the agreements involved here, as expressed in the letters passing between Fogg and Willoughby during the negotiations leading up to the making of the agreements involved in this action, wherein Fogg, on July 22nd, 1911, wrote Willoughby as follows:

“The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will give me your share of help, we will still try to pull the thing out O. K., as almost any revenue derived will be more than could be had by fighting him and each other too. After considering a good many plans, this one seems to be the best.

That is, increase the capital stock of our company to four hundred thousand dollars, give you \$80,000, and Wilson \$38,000 preferred stock at 5 per cent, in exchange for your plants, then operate only our plant and as soon as the amount of work increases any, to cut the rate to seventy-five cents and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done and we could make more money for us all by operating one plant at reduced rates than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low

abstract rates will keep out competition better than several companies at higher rates would do. At a dollar, the new man would make a little profit on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent of profit. We could do it because our plant is so complete and we have such large amount of stock on hand.

By making your stock preferred, you will get your dividends before we get anything at all and will relieve you from all worry or danger of having your plant back on your hands. You would also be able to sell this stock or use it as security much better than you can your present mortgage. We would want to put in some clause giving the company the right to retire preferred stock at certain times and in certain amounts. Kindly take up this plan with Mr. Smith and drop me a line as to what you think of it and also send any suggestions you may think of as to any better way. Our interests here are mutual and must be worked out together or both plants would be operated at a loss, for the benefit of the public.

Our idea would be to work into title certificates as fast as possible and use every effort to put new additions under the certificate system, and once under a certificate, that addition would be out of reach of any other company. By working for the first few years to keep the field clear rather than to make anything more than interest on the investment, we would have in the course of five or ten years, a business that would be almost out of the line of competition, both on account of the cost of another plant and by that time, we would have a large part of the titles under a certificate system."

(Record, p. 79.)

And again on August 3rd, 1911, Fogg wrote Wiloughby, as follows:

"I am afraid our ideas are too far apart to do us any good. The situation here is so bad that

we must have some relief or drop out of our present deals. The plan you suggested would not relieve us any, but would in fact make it far more binding on us, and if we are not able to make enough money to pay the amounts due under the present plan, we would not be able to do so under your plan.

I tried to figure out some plan that would ease us up and at the same time place you in a better and more secure position, and I think the plan suggested by me would do that. You cannot expect to be paid anything when both plants are not making anything, but under my scheme, you would get your five per cent interest from the combined earnings before we would get a cent for ourselves, and your principal would be absolutely secure, which to my mind would be a much better situation for you than the present one, although your rate of interest would be a little less than the present speculative one.

Whether or not any deal is made with you or Wilson, the rate will have to be cut to seventy-five cents and we expect to do that at once and with the intention of making it a permanent rate. We can pay expenses at fifty cents if we get most of the business, and both Frank and Mr. Gove thought it the best plan to come back to our own company and make a permanent rate of fifty cents and not try to buy the other plants as long as there was a fourth man in the field whom we had to fight anyway, but I thought I would take it up with you first and get your ideas on the matter before we did anything. It may be that as you are now foot-loose, you will want to come back here and enter the abstract field again, but with so little work to be done, we could each leave one stenographer in the office to do the work and the rest of the force go out after the four or five orders a day that could be dug up.

If you come up this way, you might drop in and we could talk over the situation anyway."

(Record, p. 81.)

And on August 7th, 1911, Willoughby replied to Fogg, as follows:

"Your letter of August third relative to the abstract situation at Tacoma has been received.

We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition whereby we would be a minority stockholder and therefore have nothing to say in the management of the company.

I expect to be in Tacoma within the next two weeks and will then talk over with you any scheme you may have that will be of mutual benefit to us all. You might bear in mind this fact and that is if we merge the plants as suggested in your letter, our interests must be protected by a guarantee of some kind."

(Record, p. 83.)

This court left out of consideration in determining the motives of the parties in the transaction of 1909, the fact that the plant of the Commonwealth Company alone, or the plant of Smith & Willoughby alone, were each capable of doing all of the abstract business in Pierce County, Washington, and that in so far as the production of abstracts was concerned there was nothing to be accomplished by Willoughby, in behalf of the Smith & Willoughby plant, or Franklin Fogg, in behalf of the Commonwealth plant in taking the lease of the Wilson plant, except to eliminate it from competition, and there was nothing to be gained in the making of the arrangement regarding the Smith & Willoughby plant, and the assignment of his interest

in the lease of the Wilson plant by Willoughby to Franklin Fogg, except to get the entire abstract business in Pierce County under one control with absolute power to fix prices.

These facts, thus omitted by this court, are among the essential and controlling facts which led to the difference between the conclusions of the trial court, and the conclusions of this court.

II.

Bearing in mind these essential facts, which were considered of primary importance by the trial court, but which apparently were not considered by this court, the facts of this case, as shown by the record, are as follows:

On and prior to December, 1909, the Willoughby, or Washington Company, and the Commonwealth, or Fogg & Gove Company, and the Wilson Company were in active and actual competition in the abstract business in Pierce County, and for many years prior to said date said three companies owned and controlled the only abstract plants in Pierce County, and transacted all of the abstract business therein. That the competition between said companies was very keen, and they were cutting prices.

That for some days prior to December 6th, 1909, the Fogs, Gove and Willoughby & Smith had been negotiating the sale of the abstract plant of the Washington Company to a corporation to be formed for that particular purpose.

That during said negotiations, and on December 6th, 1909, Willoughby and Franklin Fogg leased the Wilson plant, for a period of five years, at a monthly rental of \$316.00, plus the actual expense of keeping the plant current, which lease provided that the Wilson plant should remain in the exclusive possession of the Wilson Company, but should not be operated, and further provided that the officers of the Wilson Company should not start or be interested in any other abstract plant in Pierce County during the life of the lease.

That on December 7th, 1909, the Tacoma Company was organized by A. D. Willoughby, and one A. F. Albertson and F. A. Rice, with a capital stock of five thousand dollars, of which Willoughby subscribed for 48 shares and Albertson and Rice the remaining two shares. That thereupon the Washington Company transferred its abstract plant and business to said Tacoma Company for the agreed price of one hundred thousand dollars, payable ten thousand dollars in cash and the balance of ninety thousand dollars to be paid over a series of years, and secured by a mortgage on the plant so conveyed, plus some additional files transferred to the Tacoma Company by the Commonwealth Company by its bill of sale, of said date, in consideration of the sum of one dollar and other good and valuable considerations.

(Record, p. 110.)

On the same day said new Tacoma Company, as the owner of the former Willoughby plant, and the Washington Company, as the holder of the mortgage on the Tacoma plant, entered into an agreement with the

Commonwealth Company to the effect that "whereas the abstract plants of the respective companies might become lost, damaged or destroyed by fire, theft, etc.", therefore, for the mutual protection of said plants, it was agreed that in case of the damage or destruction of the plant of either company, such company should have the right to use the plant of the other, without expense, for the purpose of restoring its records so destroyed.

(Record, p. 111.)

On the same day Willoughby, as President of the Tacoma Company, executed and delivered the notes of that company for the ninety thousand dollar balance of the purchase price, and the mortgage of the Tacoma Company securing the same. By the terms of the mortgage part control of the plant of the Tacoma Company was preserved in Smith and Willoughby's Washington Company.

On the same day Willoughby assigned his interest in the Wilson lease to Franklin Fogg, who held the same until its expiration, and never assigned it to any company. Willoughby also on the same day assigned his stock in the Tacoma Company to the Fogs and Gove, who continued to hold the same at the commencement of this action.

Sometime prior to the making of this deal of 1909 the price of abstracts of title in Pierce County was one dollar per instrument, but as a result of competition between the three companies, the price had been cut from twenty-five to fifty per cent. That after the

completion of this deal prices were again raised to one dollar per instrument.

In 1910 the Tacoma Title Company, a new abstract concern entered the field in Pierce County, and in December, 1911, was doing about ten per cent of the total abstract business of the county, while the Commonwealth Company and the Tacoma Company did the other ninety per cent.

In the summer of 1911, the abstract business had fallen off so that it had become burdensome for defendants Fogg and Gove to operate the two separate plants and to pay the interest and make payments on the ninety thousand dollar mortgage made by the Tacoma Company, and to pay the extra expense of the part control of the Tacoma Company preserved by Smith and Willoughby under the mortgage.

Negotiations were had between Smith and Willoughby, and the Fogs and Gove, of which the letters above quoted are a part, resulting in the agreements involved in this action, the effect of which relieved the Fogs and Gove of this unnecessary burden of operating the Tacoma plant, with the incidental extra expense of paying the extra cost of Smith & Willoughby's part control thereof under the mortgage, by the Tacoma Company discontinuing business, and the existing indebtedness of the Tacoma Company rearranged with it on more favorable terms. In consideration of the shipping of the Tacoma Company's plant to Portland, to there remain locked up in a vault, thus removing it absolutely from competition with the Commonwealth Company, and the further agreement on the part of

Smith and Willoughby not to engage in the abstract business in Pierce County, Washington, for a period of thirty-six years, the Commonwealth Company, which up until this time had had nothing to do with any of the transactions and was not liable either directly or indirectly for any of the indebtedness of the Tacoma Company, executed its agreement of guaranty, by which it guaranteed the payment of a portion of the existing indebtedness of that company.

In consideration of all of these facts the trial court, with the witnesses before it, with a chance to observe their conduct and demeanor, found that the dominant purpose of Willoughby, Smith, the Foggs and Gove, and of all of the parties interested in all of the transactions of 1909 and 1911, was to form and maintain a monopoly of the abstract business in Pierce County, for the purpose of enabling them to fix and control the prices of abstracts, and to stifle all competition in the abstract business, and that the lease and sale of the Wilson and Willoughby plants, and the transactions of 1911, were merely a means or device adopted for the accomplishment of that purpose, and that, for this reason, the arrangements were in violation of the Constitution of Washington, and of the decisions of the Supreme Court of Washington, and were illegal and void.

We most earnestly insist that on the record and undisputed facts in this case this court in finding the facts as it did, contrary to the facts as found by the trial court, to the effect that the dominant purpose and controlling motive and intent of the parties was

to effect a monopoly, stifle competition and thereby fix and control prices in the abstract business in Pierce County, did violence to the well established rule that in this court the decisions of questions of fact of the trial court will not be disturbed, unless this court finds them to be contrary to the decided weight of the evidence.

We further insist that the decision of the trial court is not only not "contrary to the decided weight of the testimony", but is supported by the uncontradicted testimony in the case, and that this court will, upon a re-examination of the record in the light of the facts to which we have called attention, and which apparently were not fully considered by the court in the decision already rendered, agree with the decision of the trial court on this branch of the case.

In its opinion this court stated the rule of law relative to monopolies to be as set out in its quotation from *Cooke on Combinations*, 2d ed., Section 116, as follows:

"A monopoly exists where all, or so nearly all of an article of trade or commerce within a community or district, is brought within the hands of one man or set of men, so as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic."

And also in the court's own restatement of the rule, as follows:

"We find no principle of public policy or provision of the Washington law that requires that two or more persons or corporations engaged in

the same business, whose competition threatens ruin to all, shall continue in that competition until one or more is forced out of business, or that prohibits the ending of the destructive competition by the voluntary act of the competing parties, by one purchasing and the others selling competing plants, thus securing economy of administration, *so long as the transactions are unaccompanied by circumstances to indicate that the contracts were entered into only as a device to enhance prices or to secure control of the market.*"

Giving full weight to every part of the above quotations they are not in conflict with the decision of the Supreme Court of the State of Washington in the *Fisher Flouring Mill case*, *supra*.

The complaint we make is not as to the rule of law laid down by this court in this connection, but rather that the court failed to apply that rule of law to the undisputed evidence.

It is undisputed that competition between the three companies prior to 1909 was keen, and that prices were being cut from twenty-five to fifty per cent, and we maintain that the evidence conclusively shows that the moving cause of the transactions in question was to enhance prices and control the market. The Commonwealth Company, of which the Foggs and Gove were the sole stockholders, possessed an abstract plant capable of doing all of the abstract business in Pierce County, and in fact that plant had done all this business before the field was invaded by Willoughby and Wilson. In taking the lease of the Wilson plant it was provided that the plant should remain in the exclusive possession of the Wilson Company, but should not be

operated. What use had the lessees for this lease, for which it was agreed a rental of \$316.00 a month should be paid? The transaction is its own answer. It was for the purpose of suppressing the competition of the Wilson plant. Willoughby aided and assisted, and was one of the prime movers in obtaining this lease, and it was taken in the name of Willoughby and Franklin Fogg.

The next day the Willoughby plant was conveyed to a small dummy corporation organized by Willoughby for that purpose, whose capital stock of five thousand dollars was immediately paid up in full, so that there remained no further liability on its stockholders in connection with the Willoughby deal, and the mortgage given to secure the ninety thousand dollars of the purchase price provided that the plant should be under the joint control of both parties.

Measuring the conduct of Smith and Willoughby in this transaction by the normal conduct of one whose only concern is to effect a legitimate sale of his property, can it be said that they did not participate in and become actors in the purposes and designs of the Fogg and Gove? They themselves had an abstract plant of sufficient capacity to do the entire abstract business of Pierce County; notwithstanding this fact Willoughby becomes a party with Franklin Fogg to the lease of the Wilson plant for which his company likewise had no use, and could make no use under the terms of the lease. Was this the reasonable and normal method of a seller whose only concern is to make a sale of his own property? Was his participation

in the organization of this five thousand dollar corporation to take title to the one hundred thousand dollar property, which he was selling, the usual ordinary method employed by one who has no concern, but to make a legitimate sale? If a man's motives are to be judged by the methods which he employs it seems to inevitably follow that the conclusion of the trial court that Smith and Willoughby, and the Foggs and Gove were all knowingly working to a common end—the monopolizing of the abstract business in Pierce County, with the power to fix and enhance prices, and to secure the control of the market, is the correct one, and it must be just as apparent that these transactions, to use the language of this court,

“were accompanied by circumstances indicating that the contracts were entered into only as a device to enhance prices, and to secure the control of the market”.

FIFTH.

THIS COURT ERRED ALSO IN ITS CONCLUSION OF LAW, THAT BECAUSE IN THE TRANSACTIONS OF 1909 AND 1911, THE PARTIES WERE ONLY ENDEAVORING TO ESCAPE THE RESULTS OF THEIR RUINOUS COMPETITION, AND HAD NO INTENTION TO WRONG THE GENERAL PUBLIC, AND THAT BECAUSE THE DEFENDANTS DID NOT ABUSE THE ABSOLUTE CONTROL OF THE ABSTRACT BUSINESS WHICH THEY THUS ACQUIRED, THE TRANSACTIONS ARE NOT WITHIN THE PROHIBITION OF THE CONSTITUTION, AND ARE FREE FROM ILLEGALITY.

This conclusion overlooks the fact that, regardless of the decisions elsewhere, under the Constitution of

the State of Washington, this particular remedy for their troubles was forbidden to the parties by the express mandatory provisions of the Constitution, and the decision of the Supreme Court of Washington.

These mandatory prohibitions are that the parties cannot get relief by forming a monopoly, or by entering into a contract or combination, directly or through stockholders or otherwise, for the purpose of fixing prices. The necessities of the parties cannot override these prohibitions of the Constitution.

The fact that the contract is one to raise or control prices which are ruinous offers no excuse, as the constitutional provisions prohibit all price fixing contracts, or combinations, and contain no exceptions.

In *Standard Sanitary Manufacturing Company v. U. S.*, 226 U. S. 49, the Supreme Court stated the rule to be as follows:

“The Sherman law is a limitation of rights,—rights which may be pushed to evil consequences, and therefore restrained.”

“This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that, in the very latest of them, the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy ‘by resort to any disguise or subterfuge of form’, or the escape of its prohibitions ‘by any indirection’. *United States v. American Tobacco Co.*, 221 U. S. 106, 181; 55 L. ed. 663, 694; 31 Sup. Ct. Rep. 632. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a sup-

posed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

And in *International Harvester v. Missouri*, 234 U. S. 209, the Supreme Court said:

"The specification under this head is that the supreme court found, it is contended, benefit—not injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion, the answer is immediate. It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. *Armour Packing Co. v. United States*, 209 U. S. 56, 62; 52 L. ed. 681, 684; 28 Sup. Ct. Rep. 428; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49; 57 L. ed. 107, 117; 33 Sup. Ct. Rep. 9. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

And in *U. S. v. Union Pacific Ry.*, 226 U. S. 88, the Supreme Court says:

"Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopolies which determines the applicability of the act."

SIXTH.

THE GUARANTY OF THE COMMONWEALTH COMPANY WAS NOT GIVEN IN CONNECTION WITH ANY SALE, THE ONLY SALE MADE HAVING BEEN MADE IN 1909, TWO YEARS BEFORE.

In regard to the liability of the Commonwealth Company, this court in the course of its decision cites and

quotes from the case of *U. S. v. Great Lakes Towing Company*, 208 Fed. 733 (Op. 11), and cites and quotes from the case of *Camors McConnell v. McConnell*, 140 Fed. 412 (Op. 13) (which decision was, however, reversed by C. C. A., in 152 Fed. 321), to the effect that when a seller in connection with a sale of his property, with the good will, to another, as ancillary and incident thereto enters into a covenant with the buyer not to compete with the buyer in any way, so as to diminish the value of the property or business sold, within reasonable limitations as to time and territory, that such agreements will be enforced and upheld. Whether this be good law or not, it has no application to the facts of this case, because here there was no sale, and the agreements of 1911, upon which this action is based, were in no wise connected with the sale of any property or business to anybody. This court lost sight of the fact that the only sale of a plant, or business, was that made in 1909, and that the guaranty of the Commonwealth Company, made in December, 1911, was made solely in consideration of the agreement of Smith and Willoughby not to engage in the abstract business in Pierce County, Washington, for a period of thirty-six years, and to prevent the abstract plant of the Tacoma Company falling into hostile hands through the foreclosure of the first mortgage, and insuring its being removed from the field of competition by being boxed up and sent to Portland, and the good will attached to its business was not secured to anybody—it was simply cast adrift.

SEVENTH.

THIS COURT'S DECISION IS IN DIRECT CONFLICT WITH ARTICLE XII, SECTION 6, OF THE CONSTITUTION OF THE STATE OF WASHINGTON, AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE STATE OF WASHINGTON CONSTRUING THIS PROVISION, AND PARTICULARLY THE DECISIONS OF THE SUPREME COURT OF THE STATE OF WASHINGTON, HOLDING THAT THE PROVISIONS OF SAID SECTION CANNOT BE WAIVED.

I.

Article XII, Section 6, of the Constitution, provides:

“Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.”

While this court does not expressly so hold, it intimates that the undertaking of the Commonwealth Company, and the mortgage given to secure the same do not come within the terms of this section. The court's language indicates that it was influenced to this conclusion by the language of the caption of this section wherein the court said:

“The caption of the section, ‘Limitations upon issuance of stock’, and the language of the section lead to the conclusion that the phrase ‘other obliga-

tion for the payment of money', therein prohibited, was intended to be of the same nature as 'bonds'."

This caption is merely a caption supplied by the annotater, and is no part of the section, and is not contained in the original draft of the Constitution as adopted by the people of the State of Washington.

See

Stimson's American Constitutions, Ed. of 1894.

See first publication of Washington Constitution, 2 Hill's Statutes & Code of Washington, page 842 (1891).

The words, "or other obligation for the payment of money", were peculiar to the Constitution of the State of Washington at the time of its adoption. While we find that the Constitutions of Alabama, Arkansas, California, Colorado, Idaho, Montana, Nebraska, Illinois, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, Pennsylvania and Texas, which were adopted at or prior to the time of the adoption of the Washington Constitution, contained language substantially identical with the other portion of this section of the Washington Constitution, in the other particulars specified in Section 6, none of those constitutions contained the words, "or other obligation for the payment of money", but simply confined their prohibitions to the issuance of stock or bonds. The injection of these words into the Constitution of the State of Washington must have been intended to broaden the provision as adopted in other states, otherwise they could serve no purpose.

The Supreme Court of the State of Washington in *Bronson v. Syverson*, 88 Wash. 275 and 279, laid down the following rules for the construction of the Constitution of Washington:

“As we said on another occasion, it is a cardinal rule of construction that the language of a state constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. When, therefore, words are used in a constitution which have both a restricted and general meaning, the general must prevail over the restricted, unless the nature of the subject-matter or the context indicates that the limited sense was intended.

Another reason which leads us to the conclusion that judgments in actions for torts are debts within the meaning of the constitution is found in the fact that the prohibition with respect to imprisonment for debt therein is broader and more sweeping in its terms than are the constitutions of the states whose courts maintain a contrary doctrine. In so far as our researches have gone, the constitutions of such states contain exceptions to the general declaration which materially narrow its scope and effect. Ours, it will be observed, is without limitation as to the character of the debt, the only exception being cases of absconding debtors, which is as applicable to debts evidenced by judgments founded on contract as it is to judgments founded on tort. This distinction we cannot think to be without meaning. It would seem that, had the makers of the constitution intended that there should be limitations to the broad expression used, they would have so stated in express terms, or at least in the terms of the existing constitutions under which the limitations had been declared.”

In view of the further provision of the Constitution that all fictitious increase of indebtedness shall be void, the words, "or other obligation for the payment of money", cannot be limited to bond-like obligations, because to so limit the meaning of those words would leave it open to the corporation to create any amount of fictitious indebtedness, so long as it avoided creating that indebtedness in the form of bonds, or bond-like obligations. Again, if it was intended that the words used should cover only bonds, and bond-like obligations, there was no necessity for using the words, "for the payment of money", because there are no bonds, or bond-like obligations, except "for the payment of money".

Applying the rule of construction laid down by the Washington Supreme Court in the case above cited, it is plain that this provision of the Constitution was intended to apply to all obligations for the payment of money, whether in the form of bonds, or other instruments issued by the corporation, which might create an indebtedness against the corporation. Only by this construction can all of the words of the section be given effect.

Thus construed the guaranty of the Commonwealth Company in the case at bar was in violation of this provision since it was a contract for the payment of money, and thus created an indebtedness.

This construction is in accordance with the actual decision of the Supreme Court of Washington, in *Jorguson v. Apex Gold Mining Co.*, 74 Wash. 243, which was an action on a contract on which the Apex Gold

Mining Company agreed with Jorguson that if he would purchase certain stock of the corporation, the corporation would pay to him one thousand dollars in dividends within eighteen months, or if such amount was not paid as dividends that the same should be paid in any event. No dividends having been earned or paid, and the thousand dollars not having been paid, Jorguson brought suit on his contract to enforce payment. The Supreme Court sustained the decision of the trial court that Jorguson was not entitled to a judgment, either for dividends or for the thousand dollars, because the contract violated the above section of the Constitution.

The case of *Memphis etc. Ry. Co. v. Dow*, 120 U. S. 287, cited by the court in this connection, cannot be considered as an authority on the construction of this section, as the Arkansas Constitution under consideration there did not contain the provision, "or other obligation for the payment of money", peculiar to the Washington Constitution.

II.

Under the decisions of the Supreme Court of the State of Washington the provisions of Article XII, Section 6, of the Constitution cannot be waived. Neither can any act done in violation of it be ratified.

In the course of its opinion (Op. 16), this court says:

"But if the constitutional prohibition of Washington was not intended for the purpose indicated in *Memphis & Ry. v. Dow*, it could only have been intended for the protection of stockholders and creditors of corporations. There is no question here of the right of creditors. So far as it appears,

the plaintiff is the only creditor. There can be no doubt that the stockholders could waive their right to the constitutional protection, there being involved no question of detriment to the community, and this they did by ratifying the undertaking of the corporation and giving their individual guaranties."

This is in direct conflict with the decisions of the Supreme Court of the State of Washington declaring the public policy of the state with respect to the right of the corporation, or of stockholders, to waive the provisions of this section.

In *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, where a corporation guaranteed dividends in a sum equal to the amount paid for the stock, and notwithstanding the court found that the corporation authorized the agreement under a *resolution unanimously adopted by all of its stockholders*, it denied recovery under the agreement.

In the case of *Kom v. Cody Detective Agency*, 76 Wash. 540, the Supreme Court of the State of Washington having under consideration a similar question found it necessary to discuss the *Jorguson* case.

In the course of its opinion the court said:

"In the *Jorguson* case, the rights of creditors were not involved. The court held in strict line with the statute that a corporation could not impair its capital stock by the payment of dividends. While it does not appear in the reported decision, we deem it not out of place to say that a very able petition for rehearing was filed in that case urging that, inasmuch as the rights of creditors were not involved, and the controversy being between the individual and the corporation, we should recede from our holding and allow a recovery. We

denied the petition for rehearing; so that, when the subsequent history of the Jorguson case is understood, it seems to the writer that it is directly in point."

Quoting from *Hamor v. Taylor-Rice Co.* 84 Fed. 397, the court said:

"But whether a corporation be solvent or insolvent, the fund represented by its capital stock must remain inviolate for the protection of its creditors. In the absence of statutory authority in that behalf, a corporation has no legal power to reduce this fund by any formal or voluntary act or contract on its part, to the prejudice of its creditors, either then or thereafter existing, whether by distributing any part of it among the stockholders by way of dividend, or by giving any part of it to one or more stockholders, or by disposing of any part of it in any manner, except by way of changing its form to meet the exigencies of the corporate business.

The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

And again at page 547, the court said:

"The logic of our own cases leads us to the imperative conclusion that the absence of present creditors will not vitalize the contract sued on. This court is still committed to the trust fund doctrine as applied to corporations.

* * * We have discussed this case upon general lines, not because we have doubted the application of the statute, but because of the fact that many of the American courts have been disposed to write an exception into the statute in favor of contracting parties where the rights of present creditors are not involved."

That the undertaking of the Commonwealth Company involved here, and the mortgage given to secure the same are embraced within the constitutional provision above quoted is demonstrated beyond question by the decisions of the Supreme Court of the State of Washington, to the effect that the assets of a corporation are a trust fund in the hands of its officers as trustees, it being the settled policy of the Washington court that the whole purpose of the law, both constitutional and statutory, that the creation of corporate securities or liabilities not representing actual value, and which may impair the assets of a corporation, are inherently illegal.

In this connection that court in *Lantz v. Moeller*, 76 Wash. 435, quoting from one of its early decisions, said:

“The corporation must be in the actual condition which it represents itself to be in financially. If it were allowed to hold itself out as having a capital stock of \$100,000 when in reality the capital stock, which is and must be, under the theory of the law, assets in the hands of the corporation, is worth only one-half the amount, the corporation is to that extent doing business under false colors, and is obtaining credit upon the faith of an asserted estate which is purely fictitious.”

We submit that these decisions clearly demonstrate in no unmistakable way that the conclusion of this court in the case at bar that the stockholders of the Commonwealth Company could waive a violation of the above Section of the Constitution, and the further holding that the case at bar is taken out of the purview of the constitutional provision, because there were no present creditors of the Commonwealth Company, is directly

opposed to the decisions of the Supreme Court of Washington.

The undertaking of the Commonwealth Company, and the mortgage given by it to secure the same, were clearly fictitious within the definition of that term laid down by the Circuit Court of Appeals in *Kemmerer v. St. Louis Blast Furnace Co.*, 212 Fed. 63, where the court said:

“No consideration, whatever, passed from Whitney-Kemmerer Company to the Furnace Company at the time the bonds were issued and pledged, and none ever has passed on account of the bond issue; still an indebtedness of \$4480 is sought to be proved against the Furnace Company. If this does not make the amount of the claim fictitious within the meaning of the law, then we are unable to comprehend the meaning of the word. Fictitious—not true or real. Cent. Dict.”

In this connection we respectfully refer this court to the cases cited in our brief on appeal at pages 93 and 94.

The cases cited by this court in its opinion are instances of a waiver of affirmative rights granted to the citizen, the waiver of which does not contravene any principle of public policy, and are not instances of a waiver of mandatory prohibitions.

EIGHTH.

THIS COURT WAS IN ERROR IN HOLDING THAT THE COMMONWEALTH COMPANY WAS IN FACT THE PURCHASER OF PLAINTIFF'S PLANT, AND THAT IT ORGANIZED THE FIVE THOUSAND DOLLAR CORPORATION FOR THE PURPOSE OF RECEIVING TITLE TO THE PURCHASED PROPERTY.

The stipulated facts are (Record, p. 77), that Willoughby, and one A. F. Albertson and one F. A. Rice, incorporated the five thousand dollar purchasing company, for the purpose of receiving title to the purchased property, and after the title had been taken, the capital stock of the purchasing company was assigned by Willoughby to the Foggs and Gove, and was fully paid up.

In the transaction of 1909 the Commonwealth Company did not incur any indebtedness. The parties themselves recognized that this plant never became a part of the Commonwealth Company's property, for we find Willoughby himself long after, on August 7th, 1911, writing a letter to Horace Fogg where he says:

“You must bear in mind this fact, and that is, if we merge the plants, as suggested in your letter, our interests must be protected by a guarantee of some kind.”

(Record, p. 83.)

And further on, on this phase of the case, this court says:

“In that manner the Commonwealth Company acquired the purchased property, and we see no reason in law or in equity why its undertaking to pay for the same should not be enforced; to guarantee the payment of its own indebtedness was not to

issue bonds or other obligations for the payment of money. * * * As a consideration for the guaranty there was not only an existing indebtedness, but there was a present moving consideration in the refunding of the indebtedness on more favorable terms, and the release of a burden that had been imposed upon the guarantor."

This statement assumes a condition clearly unsupported by any testimony. The Commonwealth Company had not prior to the execution of its guaranty in 1911, secured by its mortgage, undertaken to pay any part of the purchase price of plaintiff's plant. The obligation to pay this purchase price was expressed by a contract in writing to which the Commonwealth was not a party, so that as far as it was concerned at the time of the execution of the guaranty there was no "existing indebtedness" for the payment of which it was responsible. It having been stipulated by the parties that the capital stock of the five thousand dollar Tacoma company was paid in full, there could be no liability of any nature on the part of any stockholder of the Tacoma Company, whether the Commonwealth Company, or any one else, as Article XII, Section 4, of the Constitution of Washington provides:

"Each stockholder in all incorporated companies * * * shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more."

That a corporation is a distinct legal entity, as distinguished from its stockholders, and that a guaranty by the largest stockholder of a corporation of a debt of the corporation was the debt of another person under

the statute of frauds of the State of Washington, and must be evidenced by a writing to be binding, was decided and settled by the Supreme Court of the State of Washington in the case of *Goldie-Klenert Distributing Co. v. Bothwell*, 66 Wash. 267.

In the case of *Pittsburg & Buffalo Co. v. Duncan*, 232 Fed. 584, the Circuit Court of Appeals, Sixth Circuit, said:

“The mere fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one binding upon the other, where each corporation is separately organized under a distinct charter.”

Even assuming, as this court does, that the existing indebtedness of the Tacoma Company was the indebtedness of the Commonwealth Company, and that as a consideration for the refunding of that indebtedness on more favorable terms it executed the undertaking secured by the mortgage on its plant involved in this action, the transaction would still be one clearly prohibited by this Section of the Constitution, as the renewal, or the extension of an indebtedness on more favorable terms is not “money or property received, or labor done,” and an agreement made by a corporation to pay money, based on such a consideration, is in violation of the constitutional provision referred to, and cannot be enforced.

In *Nichols v. Waukesha Co.*, 195 Fed. 807, the Circuit Court of the Eighth Circuit said:

“Existing debts are not money, and to say that they are property capable of estimation at its true money value does violence to the words used.”

The decision of this court on this assumed state of facts is in direct conflict with its decisions in the case of *Farmers Loan & Trust Co. v. San Diego St. Ry. Co.*, 45 Fed. 528.

Chavelle v. Washington Trust Co., 226 Fed. 408.

And is in direct conflict with the decisions of the federal court of other circuits, notably,

Mudge v. Black, 224 Fed. 919;

In re Progressive Wall Paper Co., 229 Fed. 496,

which presents almost a parallel situation.

Pacific Coast Pipe Co. v. Conrad, 237 Fed. 675;

Lyon v. Bleeg, 240 Fed. 407;

Kemmerer v. St. Louis Blast Furnace Co., 215 Fed. 65.

In view of the foregoing we respectfully submit a rehearing of this case should be granted.

CHARLES O. BATES,

CHARLES T. PETERSON,

EDWARD FOGG,

*Solicitors for Appellees
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellees and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES O. BATES,

*Of Counsel for Appellees
and Petitioners.*

No.

3014

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. W. JENKINS & COMPANY, a Corporation,

*Appellant,
Plaintiff in Error*

vs.

ANAHEIM SUGAR COMPANY, a Corporation,

*Appellee
Defendant in Error*

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

Filed

JUN 22 1917

F. D. Monckton,
Clerk.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. W. JENKINS & COMPANY, a Corporation,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,

*Appellant,
Plaintiff in Error*

*Appellee
Defendant in Error*

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

FOR PLAINTIFF^{in Error}~~AND APPELLANT~~:

CARROLL ALLEN, BERTIN A. WEYL, Esqs.,
219 H. W. Hellman Building, Los Angeles,
California.

FOR DEFENDANT^{in Error}~~AND APPELLEE~~:

GRAY, BARKER & BOWEN, Esqs., Suite 1029
Title Insurance Building, Los Angeles, Cali-
fornia.

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Citation.

United States of America—ss.

To Anaheim Sugar Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States for the Ninth Circuit to be held at the city of San Francisco, state of California, on the 22 day of May, 1917, pursuant to an order allowing a writ of error filed and entered in the clerk's office of the District Court of the United States, in and for the Southern District of California, Southern Division, from a final judgment and decree signed, filed and entered on the 23 day of April, 1917, in that certain suit, being #355 Civil, wherein T. W. Jenkins & Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment and decree rendered against appellant as in said order allowing said writ of error mentioned should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Oscar A. Trippet, United States district judge for the Southern District of Cali-

ifornia, Southern Division, this 23 day of April, 1917, and the Independence of the United States.

OSCAR A. TRIPPET,

United States District Judge for the Southern District of California, Southern Division.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Citation. Received copy of the within Apr. 23, 1917. Donald Barker, by J. E. K. Filed Apr. 24, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation.

Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America—ss.

The President of the United States to the Honorable Benjamin F. Bledsoe, Judge of the United States District Court, in and for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the

rendition of the judgment and decree of a plea which is before said District Court between T. W. Jenkins & Company, a corporation, plaintiff in error, and Anaheim Sugar Company, a corporation, defendant in error, a manifest error hath happened to the great damage of said plaintiff, T. W. Jenkins & Company, a corporation, as by its complaint appears. We, being willing that error if any hath been shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Circuit Court of the United States for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty (30) days from the date hereof in the said Circuit Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States Supreme Court, this 23rd day of April, 1917.

(Seal)

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

Allowed by:

OSCAR A. TRIPPET,
Judge.

I hereby certify that a copy of the within writ of error was on the 23rd day of April, 1917, lodged in the clerk's office of said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Writ of error. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., Attorneys for plaintiff.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 355 Civil.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Second Amended Complaint—At Law Damages for Breach of Contract.

Now comes the plaintiff above named and, after leave of court first had and obtained therefor, files this its second amended complaint against Anaheim Sugar Company, a corporation, and for cause of action alleges:

I.

That at all times herein mentioned the plaintiff, T. W. Jenkins & Company, has been and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon, and has had, and now has, its principal place of business in the city of Portland, in said state of Oregon, and has been, and now is, engaged in buying and selling and dealing in sugar and kindred articles. That at all the times herein mentioned the plaintiff has been, and now is, a citizen and resident of the state of Oregon aforesaid.

II.

That at all the times herein mentioned the defendant, Anaheim Sugar Company, has been, and now is, a corporation organized and existing under and by virtue of the laws of the state of California, and has had, and now has, its principal place of business at Anaheim, in the county of Orange, in the said state of California, and has been, and is now, engaged in the business of manufacturing and refining sugar. That at all the times herein mentioned the said defendant has been, and now is, a citizen and resident of the state of California, and has resided, and now resides, in the South-

ern District of the state of California, and in the Southern Division thereof.

III.

That on or about the 13th day of June, 1914, at the city of San Francisco, state of California, the plaintiff and defendant made and entered into an agreement in writing, in the words and figures as follows, to-wit:

(Contract subject to unforeseen acts of Providence, such as fire, earthquake, flood.)

San Francisco, Calif., June 13, 1914.

A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Company, party of second part.

To wit:

Party of first part sells and party of second part buys August requirements bags fine granulated beet sugar at \$4.20 per bag less 2% cash 8 days, f. o. b. San Francisco, August shipment.

It being understood and agreed that party of the first part guarantees the price up to time of arrival against decline only to the basis of the C. & H. and Western Sugar Refining Co.

ANAHEIM SUGAR COMPANY,

Per Ariss, Campbell & Gault, Agts.,

Party of 1st Part.

T. W. JENKINS & COMPANY,

Party of 2nd Part.

IV.

That the price agreed upon between plaintiff and defendant, to-wit, four and 20/100 dollars (\$4.20) per bag, was ten per cent (10%) less than the prevailing market price at San Francisco, the place where said

contract was entered into, and said price was fixed by defendant in consideration of the plaintiff agreeing with the defendant that it would purchase exclusively from defendant all fine granulated beet sugar required in its business during the month of August, 1914, and relying upon defendant's agreement to sell to plaintiff all fine granulated beet sugar required by it in its business during the said month of August, plaintiff made no other arrangement for the purchase of its August requirements and did not purchase any fine granulated beet sugar from any person or persons other than defendant above named.

V.

That thereafter during the month of August, 1914, plaintiff required in its business and ordered of defendant four thousand eight hundred (4800) bags of fine granulated beet sugar, and there was shipped and delivered from time to time during said month of August by defendant to plaintiff six hundred (600) bags of fine granulated beet sugar, and no more.

VI.

That the time for the delivery of the said sugar so ordered by plaintiff of defendant has elapsed; that plaintiff during the month of August required and demanded of defendant that it ship and deliver to plaintiff the additional four thousand two hundred (4200) bags of said sugar ordered by it during said month of August as aforesaid, but defendant did then and ever since has refused to ship or deliver said four thousand two hundred bags of said sugar, or any part thereof, and has not shipped or delivered the same, or any part thereof, to the plaintiff.

VII.

That plaintiff was at all times during the said month of August, and after its order to defendant to ship and deliver the said four thousand two hundred (4200) bags of said sugar, ready, willing, and able to accept the shipment and delivery of the whole thereof, and to pay for the same at the price and upon the terms aforesaid and according to said agreement.

VIII.

That at the time said contract was entered into plaintiff was, and had been for many years, engaged in the wholesale grocery business in the city of Portland, state of Oregon, and in the pursuit of and carrying on of said business it had in the states of Oregon, Washington and California, and other places, many thousands of customers to whom it sold goods, wares, merchandise and sugar. That much of plaintiff's business consisted in the dealing in and selling at wholesale to its said customers in said places sugar in bag lots. That said dealing in and sale of sugar was carried on by plaintiff in the following manner: That plaintiff would contract with a sugar producer or a sugar refiner for the sale to it, covering a specified period, of such sugar as it would require in its business and for its sale to said customers, and that plaintiff would thereupon receive from and solicit from its said customers orders for sugar in bag lots at a stipulated price, based on the contract price between plaintiff and said producer or refiner of said sugar, delivery to be made to its said customers at a future time agreed upon between the plaintiff and its said customers at the time of such sale, all of which said facts were well known to defendant

herein at the time said contract was entered into by and between plaintiff and defendant.

IX.

That plaintiff, in its said business, as hereinbefore set forth, usually and ordinarily required during the month of August of each year, and that it had required during the month of August for many years last past, sugar of the kind and character ordered from defendant in excess of four thousand eight hundred (4800) bags, and that relying upon said contract and the terms thereof, and upon said knowledge of defendant, plaintiff did solicit and receive from many of its customers orders for four thousand eight hundred (4800) bags of fine granulated beet sugar, which said sugar plaintiff intended to furnish and deliver to its said customers from the sugar to be ordered from and delivered by defendant, under the terms of said contract, to plaintiff herein. That plaintiff agreed with its said customers to furnish and deliver said sugar at the prices and at the times agreed upon between plaintiff and its customers, and that plaintiff therefore required in its said business and in the pursuit thereof, as hereinbefore set forth, during the month of August, 1914, the said four thousand eight hundred (4800) bags of sugar, and that at the time said contract was entered into the defendant knew, and ever since that time has known, the nature and character of plaintiff's business and the manner in which it was conducted, as hereinbefore set forth, and what plaintiff's requirements for sugar would be during the term of said contract entered into with plaintiff, and that relying upon said contract and upon said knowledge on the part of defendant, plaintiff did enter into

with its said customers the contracts for the delivery of sugar, hereinbefore referred to, and that by reason thereof it required in its said business during the month of August, 1914, the said four thousand eight hundred (4800) bags of sugar.

X.

That all of said four thousand eight hundred (4800) bags of sugar which plaintiff herein had contracted and agreed to furnish to its said customers were sold to its said customers for delivery to them during the month of August, 1914, and that orders therefor were taken by the plaintiff herein from its said customers during the months of July and August, 1914.

XI.

That by reason of the refusal of the defendant to deliver said four thousand two hundred (4200) bags of sugar and by reason of the non-delivery thereof, the plaintiff lost its profits on the re-sale thereof, and was compelled to and did buy in the open market, at the prevailing market price, fine granulated beet sugar at a price in excess of said contract price, amounting to three and 10/100 dollars (\$3.10) per bag, and that it did purchase in the open market at said advanced price four thousand two hundred (4200) bags of said sugar for delivery to its said customers.

XII.

That by reason of the premises plaintiff has been damaged by defendant in the sum of thirteen thousand and twenty dollars (\$13,020.00).

Wherefore, plaintiff demands judgment against the defendant, Anaheim Sugar Company, in the sum of thirteen thousand and twenty (\$13,020.00), lawful

money of the United States of America, for its costs of suit, and for such other and further relief as may to the court seem meet and proper.

ALLEN & WEYL,
Attorneys for Plaintiff.

State of California, County of Los Angeles—ss.

Bertin A. Weyl, being duly sworn, deposes and says: That he is a member of the firm of Allen & Weyl, attorneys-at-law, and that he is one of the attorneys for the plaintiff in the above entitled action; that the plaintiff is a corporation and does not reside in the county and does not have its office or principal place of business in the county where its said attorneys reside; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information or belief, and as to those matters that he believes it to be true.

BERTIN A. WEYL.

Subscribed and sworn to before me this 3rd day of March, 1916.

(Seal) L. P. MAYO,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Second amended complaint—at law damages for breach of contract. Received copy of the within Mar. 3, 1916. Gray, Barker & Bowen, by J. E. K. Filed Mar. 4,

1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

*In the United States District, Southern District of
California, Southern Division.*

File No. 355.

T. W. JENKINS,

Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Demurrer to Second Amended Complaint.

Comes now the defendant and demurs to the second amended complaint of the plaintiff upon the following grounds, to-wit:

I.

That said second amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said second amended complaint is uncertain in the following particulars, to-wit: In that it cannot be ascertained therefrom:

(a) What is meant by the term "August requirements bags" contained in the contract set out in paragraph III of the second amended complaint.

(b) Whether it is intended by plaintiff to allege that there was a contract between plaintiff and defendant other than said written agreement set out in the complaint, whereby plaintiff agreed with defendant that

he would purchase "exclusively from defendant all fine granulated beet sugar required in its business during the month of August, 1914," or whether by the allegations of paragraph IV of the second amended complaint plaintiff seeks to have said written contract interpreted to constitute such agreement.

(c) Whether plaintiff intends to allege that defendant agreed by an agreement other than said written contract to sell to plaintiff "all fine granulated beet sugar required by it in its business during the said month of August."

(d) Whether it is intended by the allegations of paragraph XI of the second amended complaint to allege that plaintiff purchased in the open market at an advanced price therein stated 4200 bags of sugar for delivery to its customers during the month of August, 1914, or whether said alleged purchases were made for delivery at other periods.

(e) When delivery to plaintiff's alleged customers of the sugar so alleged to have been purchased at such alleged advanced price, was actually made by plaintiff.

(f) When plaintiff obtained from its alleged customers orders for the 4800 bags of sugar mentioned in paragraph IX of the second amended complaint and whether it is intended by plaintiff to allege that orders for all of the said 4800 bags were taken by the plaintiff during the months of July and August, 1914.

(g) What quantities of sugar plaintiff actually purchased at the advanced price alleged in said second amended complaint during the months of July and August, 1914, for delivery during said month of August.

(h) Whether it is intended by the allegations of paragraph IX of said second amended complaint to allege that for many years prior to the making of said alleged contract set out in paragraph III of the complaint, plaintiff had actually sold and delivered or sold or delivered to its customers during the month of August of each year, in excess of 4800 bags of sugar;

(i) From what particular customers the plaintiff received orders for the 4800 bags of sugar mentioned in paragraph IX of the second amended complaint.

(j) How or in what manner plaintiff was "compelled" to buy in the open market the sugar mentioned in paragraph XI of said second amended complaint;

(k) When plaintiff purchased in the open market the 4200 bags of sugar which in paragraph XI of the second amended complaint are alleged to have been purchased by plaintiff for delivery to its customers.

(l) Whether it is intended to allege in said second amended complaint that plaintiff bought in the open market at the advanced price mentioned in paragraph XI of said complaint the 4200 bags of sugar mentioned therein to fill orders alleged to have been taken by plaintiff in July and August, 1914, or whether it is intended to allege that said alleged orders for said 4200 bags of sugar were in fact filled by plaintiff by deliveries either during the month of August or at any other time.

III.

That said second amended complaint is ambiguous for the same reasons and upon the same grounds hereinbefore alleged for its uncertainty.

IV.

That said second amended complaint is unintelligible for the same reasons and upon the same grounds hereinbefore alleged for its uncertainty.

GRAY, BARKER & BOWEN,

By Donald Barker,

Attorneys for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

DONALD BARKER,

Of Counsel for Defendant.

[Endorsed]: Original. No. 355. United States District Court, Southern District of California, Southern Division. T. W. Jenkins & Company, complainant, vs. Anaheim Sugar Company, defendant. Demurrer to second amended complaint. Due service of the within demurrer to second amended complaint is hereby admitted this 13th day of March, 1916. Allen & Weyl, attorneys for plaintiff. Filed Mar. 13, 1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Gray, Barker & Bowen, suite 1029 Title Insurance Building, Fifth and Spring streets, Los Angeles, California. Telephones: Home 10601, Sunset Main 685. Solicitors for defendant.

Copy Order Sustaining Demurrer to Second Amended Complaint.

At a stated term, to wit: the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room

thereof, in the city of Los Angeles, on Monday, the 6th day of November, in the year of our Lord one thousand nine hundred and sixteen:

Present:

The Honorable Benjamin F. Bledsoe, district judge.

No. 355 Civil, S. D.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

This cause having heretofore been submitted to the court for its consideration and decision on defendant's demurrer to plaintiff's second amended complaint; the court, having duly considered the same and being fully advised in the premises, now hands down an opinion herein, and it is ordered that defendant's said demurrer to the second amended complaint herein be, and the same hereby is sustained, with leave to plaintiff to amend said second amended complaint within ten (10) days, if it shall be so advised.

[Endorsed]: No. 355 Civil. United States District Court, Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs Anaheim Sugar Company, a corporation, defendant. Copy order sustaining demurrer to second amended complaint. Filed Apr. 24, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy.

*In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

No. 355 Civil.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Notice of Refusal to Amend.

To the Defendant Above Named, and to Messrs. Gray,
Barker & Bowen, Its Attorneys:

You will please take notice that the plaintiff in the
above entitled action declines to amend its amended
complaint as on file in the above entitled action.

ALLEN & WEYL,
Attorneys for Plaintiff.

Dated Feb. 15, 1917.

[Endorsed]: Original. No. 355 Civil. In the
United States District Court, in and for the Southern
District of California, Southern Division. T. W. Jen-
kins & Company, a corporation, plaintiff, vs. Anaheim
Sugar Company, a corporation, defendant. Notice of
refusal to amend. Received copy of the within Feb.
15, 1917. Donald Barker, by J. E. K. Filed Feb. 16,
1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman,
deputy clerk. Carroll Allen, Bertin A. Weyl, 219
H. W. Hellman Building, cor. 4th & Spring Sts., Los
Angeles, Cal., attorneys for plaintiff.

*In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

No. 355 Civil.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Judgment.

It appearing to the court that an order was heretofore, on the 6th day of November, 1916, duly given, made and entered herein sustaining the demurrer of the defendant to plaintiff's complaint, and that no application was made to amend said complaint and no amendment of said complaint has been made, and it appearing to the court that said complaint and said action should be dismissed, and the court having on this 23rd day of April, 1917, on motion of Donald Barker, Esq., of counsel for defendant, ordered that said action be dismissed;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that said action be, and the same is hereby dismissed and that said defendant do have and recover of and from said plaintiff their said, defendant's, costs taxed herein at \$14.00. Judgment entered April 23rd, 1917.

WM. M. VAN DYKE,

Clerk.

By T. F. Green,

Deputy Clerk.

[Endorsed]: No. 355 Civil. United States District Court, Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Copy of judgment. Filed Apr. 24, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy.

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Order of Allowance of Writ of Error.

Upon the rendering of the judgment and decree herein in the above entitled cause on this date dismissing plaintiff's second amended complaint, and plaintiff and defendant being represented in court by their respective counsel, T. W. Jenkins & Company, a corporation, by Messrs. Carroll Allen and Bertin A. Weyl, its attorneys, gave notice in open court of its application for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and decree of this court, and at the same time did file its assignment of errors, and it appearing that its application should be granted and that a transcript of the record, proceedings and papers, upon which the judgment of the court was rendered, properly certified, should be sent to the Circuit Court of Appeals of the

*In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

No. 355 Civil.

T. W. JENKINS & CO., a Corporation,

Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,

Defendant.

Opinion on Demurrer.

Carroll Allen and Bertin A. Weyl, attorneys for plaintiff.

Gray, Barker & Bowen, attorneys for defendant.

Bledsoe, district judge.

This is a suit for damages in the sum of \$13,020 alleged to be due plaintiff because of defendant's breach of contract.

The complaint shows that plaintiff in June, 1914, the time of the execution of the contract, was engaged in the wholesale grocery business in the state of Oregon, and that, in the carrying on of said business, it had many thousands of customers to whom it sold goods, wares, merchandise and sugar. Apparently, from the allegations of the complaint, it had no other business than that above mentioned. It is alleged that the defendant, at all times in question, was aware of the general nature and character and mode of carrying on of the wholesale grocery business conducted by plaintiff.

Plaintiff also alleges that usually and ordinarily it required during the month of August each year, and

had so required during the month of August for many years past, sugar, in bags, for sale by it to its customers at wholesale, in excess of 4800 bags, and that defendant at the time of the execution of the contract in question was aware of the requirements of plaintiff in the behalf just referred to. Under these circumstances, on the 13th of June, 1914, plaintiff and defendant entered into an agreement in writing whereby defendant, a manufacturer of sugar, agreed to sell, and plaintiff, as a wholesale vender of groceries, agreed to buy, all of plaintiff's "August requirements" of sugar at a fixed price of \$4.20 per bag. No other terms, material to this controversy, were inserted. It is then alleged in appropriate language that plaintiff's requirements during the aforesaid month of August were, and it ordered of defendant, 4800 bags of the sugar described in the agreement above referred to, but that in response to such order and demand defendant shipped and delivered to plaintiff only 600 bags of the sugar. Plaintiff then alleges that it was compelled because of such refusal and default of defendant to go into the open market and purchase 4200 bags of such sugar at a price amounting to \$3.10 per bag in excess of the contract price, and it is because of such excess for the sugar so purchased that the action is maintained.

The case is before the court on demurrer, both general and special, to the second amended complaint, and I am persuaded that, in accordance with a ruling heretofore rendered by the court upon the original complaint, the general demurrer should be sustained at this time.

The claim of defendant, of course, is that the contract as entered into is not supported by sufficient consideration to give it vitality; that it is void because lacking in mutuality; that it is one-sided in its entirety, in that the defendant, under any and all circumstances, could be compelled to furnish the sugar covered by the contract, but that plaintiff could in nowise be compelled by defendant to order and accept any sugar thereunder.

After very careful consideration of the particular circumstances of the case, upon reason as well as upon authority, I am constrained to accept defendant's contention. The books are full of cases, and the most important of them have been cited herein by plaintiff, to the effect that a contract binding one party to sell, and the other party to buy, all of the "requirements" of the latter's *established business* as to a given commodity, will be enforced, and this because of the fact that the ascertainment of such requirements is possible with sufficient definiteness and certainty; the subject matter of the contract being thus rendered certain, in the face of the positive reciprocal obligations complete mutuality is secured, and a breach by either party can be the basis of relief to him who tenders or has given full performance. As a necessary element of this wholesome conclusion, however, the courts have been forced to indulge in the presumption that the parties intended that the established business of the purchaser was to be carried on, substantially as of the time of contract, and that the purchase and *use* therein of the

commodity forming the subject matter of the contract would be but an *incidental* feature of the carrying on of such established business. Thus, contracts for the purchase and sale of all the ice needed for a hotel, all the coal required for a line of steamships, all the castings required for a certain manufactured product, have been upheld and enforced. It will be observed that the principle involved, and which is reflected in all of the cases, with the exception of but one or two to which attention will be directed, has to do with a purchase by, and a sale for the use of, an established business, in which, presumably, as above adverted to, the use of the commodity purchased is but an *incident* to the carrying on of the business itself, and because of which fact, therefore, the presumption can be indulged in that the business will be carried on and the incidental use of the commodity will continue, substantially as intended by the parties, entirely irrespective of any rise or fall in the price of the commodity itself.

At the very threshold of the present case, however, we are met by the fact that the business of plaintiff is not that of manufacturing, or of similar import in which its use of sugar would form but an incident of its general business, but it is that alone of *selling* sugar and other articles at wholesale. It buys such sugar, presumably, only as it can sell at a profit at current market prices, and it refrains from buying sugar which, because of a fall in price, it will be unable to sell except at a loss to itself. Here, the presumption which is in-

dulged in and is referred to in many of the cases cited, has no application or play, because of the fact that the purchase and use of the commodity in question becomes, under such circumstances, not an incident to the main business of the purchaser, but the main business itself. Any fluctuation in the price of the commodity, especially if of generous proportions as in the case at bar, inevitably affects the use of the commodity by the purchaser, and tends to negative the presumption that the business will continue substantially as intended by the parties. In this view of the case, the supposed "requirements" of the plaintiff in its wholesale business, are not the requirements of an established manufacturing or similar business, as the phrase is used in the reported cases. Presumably, plaintiff, during a given period, will "require" in its business just the amount of sugar it can sell. It will sell the amount of sugar it can dispose of at a profit; the greater the profit the more it will dispose of; if it can dispose of none at a profit, it will require none.

The situation can be stated concretely in a few words; plaintiff had contracted for all the sugar it would "require," meaning, of course, in its particular business, all it could sell, at the fixed price of \$4.20 per bag. Before the contract became operative the price of sugar in the market rose to \$7.30 per bag. It needs no argument to show, that with an unlimited supply—its "requirements"—at \$4.20, there would be brought into play no particular effort or business sagacity on the part of plaintiff to effect sales at a

handsome profit with the general market price firm at \$7.30. To presume that it would not so conduct itself, is to go counter to human experience. On the contrary, if the market price had fallen considerably, plaintiff would have refused to sell save at a profit on its own purchase price, in which event none would have been so foolish as to buy, or it would have instructed its solicitors that it had no sugar at all to sell. In either event, its "requirements" would have been the same, to-wit: practically *nil*. It would have bought no sugar from third persons and would, therefore, have committed no breach of its engagement with defendant. To presume otherwise would be to disregard the most obvious motives of self-interest.

The exact position of the parties and the consequent invalidity of the contract relied upon is portrayed with such clearness and cogency in the decision of the Circuit Court of Appeals for the 7th circuit in *Crane v. Crane*, 105 Fed. 869, that further comment upon it herein would seem to be a work of mere supererogation. Speaking of a similar contract which was held invalid Judge Grosscup said:

"Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error, and such customers as usually come to a merchant. Should the contract under discussion be upheld, the plaintiffs in

error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also, the *quantum* of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued.

“On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the *quantum* of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—in a situation to either go on, or to discontinue, as such interest develops.

The cases relied upon by plaintiff are Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77, 11 L. R. A. N. S. 713; Manhattan Oil Co. v. Richardson Lubricating Co., 113 Fed. 923; Marx v. American Malting Co., 169 Fed. 582; Golden Cycle Mining Co. v. Rapson Coal Mining Co., 188 Fed. 179; A. Klipstein & Co. v. Allen, 123 Fed. 992; Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co., 162 Fed. 848. These, and other cases based upon similar states of fact, which have been examined,

though not cited by plaintiff in its brief, announce the doctrine adverted to hereinabove, and with which this court is in entire harmony, that an agreement to buy and sell the "requirements" of an established business, in which the use of the thing "required" is but incidental to the carrying on of the business itself, is valid and will be upheld. It is also true, as contended by plaintiff, that the courts have departed from their earlier holdings (e. g., *Bailey v. Austrien*, 19 Minn. 535) and that the well established tendency now is to hold contracts for the purchase of an article "required" or "needed" or "wanted" for such an established business to be valid. If the amount of the commodity to be purchased under the contract is determinable by the mere "wish," "desire" or caprice of the purchaser, the courts are still unyielding in their disapproval. (*Kirk Soap Case*, 68 Fed. 791.)

No court, however, in so far as I have been able to ascertain, with the exception of the two cases now to be mentioned, has held that a contract for purchase, not for use in an established business, but for sale only, under circumstances similar to the case at bar, is valid. The Supreme Court of Illinois in *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 168 Ill. 385, 44 N. E. 774, 31 L. R. A. 529, did hold that a contract for the purchase and sale of the "requirements" of defendant coal company "engaged in the purchase, use and sale of coal in its business" was valid. Aside from the fact that the purchaser in that case not only expected to sell coal, but to use it as well, the point considered herein

and determined adversely to plaintiff's contention in *Crane v. Crane*, *supra*, was not made or considered therein. In addition, the conclusion of the court with respect to this branch of the case is based entirely upon the cases of the *National Furnace Co. v. Keystone Manufacturing Co.*, 110 Ill. 427, and *Smith v. Morse*, 20 La. Ann. 220, both of which had to do with circumstances similar to those in the cases cited by plaintiff and in which the requirements were for an established business other than that of the sale of the precise commodity in question. The same situation existed in *Hickey v. O'Brien*, 123 Mich. 611, 49 L. R. A. 594. The only authority therein cited in support of the conclusion reached was the *National Furnace Company* case, which was not applicable under the circumstances shown. The conclusion of the Circuit Court of Appeals of the Seventh Circuit in the *Crane* case, hereinabove referred to, finds support, in my judgment, in *A. S. Santaella Co. v. Otto F. Lange & Co.*, 155 Fed. 719; *Coal Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, and *Higbie v. Rust*, 71 N. W. 1010.

I have not overlooked the point made that a sufficient consideration—"detriment to the promisee"—existed, in that plaintiff obligated itself to buy none of its "August requirements" from any person other than defendant. Obviously, however, if its obligation had been to buy not what it "required" but what it merely "desired" from defendant alone, during August, the same sort of consideration—an agreement not to pur-

chase from anyone else—would have subsisted. Notwithstanding this, under the principles referred to in all the cases, even those relied upon by plaintiff, the contract would have lacked validity, not from a want of consideration but, as herein, from a lack of mutuality.

The demurrer will be sustained.

[Endorsed]: No. 355 Civil. U. S. District Court, Southern District of California. T. W. Jenkins & Co., a corporation, vs. Anaheim Sugar Company, a corporation. Opinion on demurrer. Filed Nov. 6, 1916. Wm. M. Van Dyke, clerk; T. F. Green, deputy.

United States for the Ninth Circuit as prayed for in order that such proceedings may be had as may be just;

Now, therefore, it is ordered that the writ of error be allowed upon bond being furnished by the plaintiff conditioned according to law in the sum of two hundred fifty (\$250.00) dollars, and that a true copy of the record, assignment of errors, and all proceedings in the case in the District Court of the United States, in and for the Southern District of California, Southern Division, shall be transmitted to the Circuit Court of the United States for the Ninth Circuit, duly certified according to law, in order that said court may inspect the same and take such action thereon as it may

chase from anyone else—would have subsisted. Notwithstanding this, under the principles referred to in all the cases, even those relied upon by plaintiff, the contract would have lacked validity, not from a want of consideration but, as herein, from a lack of mutuality.

The demurrer will be sustained.

[Endorsed]: No. 355 Civil. U. S. District Court, Southern District of California. T. W. Jenkins & Co., a corporation, vs. Anaheim Sugar Company, a corporation. Opinion on demurrer. Filed Nov. 6, 1916. Wm. M. Van Dyke, clerk; T. F. Green, deputy.

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Order of Allowance of Writ of Error.

Upon the rendering of the judgment and decree herein in the above entitled cause on this date dismissing plaintiff's second amended complaint, and plaintiff and defendant being represented in court by their respective counsel, T. W. Jenkins & Company, a corporation, by Messrs. Carroll Allen and Bertin A. Weyl, its attorneys, gave notice in open court of its application for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and decree of this court, and at the same time did file its assignment of errors, and it appearing that its application should be granted and that a transcript of the record, proceedings and papers, upon which the judgment of the court was rendered, properly certified, should be sent to the Circuit Court of Appeals of the

United States for the Ninth Circuit as prayed for in order that such proceedings may be had as may be just;

Now, therefore, it is ordered that the writ of error be allowed upon bond being furnished by the plaintiff conditioned according to law in the sum of two hundred fifty (\$250.00) dollars, and that a true copy of the record, assignment of errors, and all proceedings in the case in the District Court of the United States, in and for the Southern District of California, Southern Division, shall be transmitted to the Circuit Court of the United States for the Ninth Circuit, duly certified according to law, in order that said court may inspect the same and take such action thereon as it may deem proper according to law.

OSCAR A. TRIPPET,

Judge.

Dated April 23, 1917.

[Endorsed]: Original. No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Order of allowance of writ of error. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Now comes plaintiff by its attorneys in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the judgment and decree made by this honorable court on the 23rd day of April, 1917.

I.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in sustaining the demurrer of the defendant to the second amended complaint filed by plaintiff and appellant.

II.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the plaintiff's second amended complaint did not state facts sufficient to constitute a cause of action.

III.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the second amended complaint of the plaintiff was uncertain.

IV.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the second amended complaint of the plaintiff was ambiguous.

V.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the second amended complaint of the plaintiff was unintelligible.

Wherefore, the appellant prays that said judgment and decree be reversed, and the said United States District Court, in and for the Southern District of California, Southern Division, be ordered to enter a judgment and decree reversing the decision of the lower court in said cause, and that said demurrer to plaintiff's second amended complaint be overruled, and for further proceedings as prayed for in said second amended complaint.

CARROLL ALLEN &
BERTIN A. WEYL,

Attorneys for Plaintiff and Appellant.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Assignment of errors. Received copy of the within assignment of errors this 23rd day of April, 1917. Donald Barker, attorney for defendant. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk; Carroll Allen, Bertin A. Weyl, 219

H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Bond.

Know All Men by These Presents:

That T. W. Jenkins & Company, a corporation, as principal, and Albert Jenkins and E. J. Hall, as sureties, of the county of Multnomah, state of Oregon, are held and firmly bound unto the Anaheim Sugar Company, a corporation, in the sum of two hundred fifty (\$250.00) dollars, lawful money of the United States, to be paid to it and its successors; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 5th day of April, 1917.

Whereas, the above T. W. Jenkins & Company, a corporation, is about to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit to reverse the judgment of the District Court of the United States, in and for the Southern District of California, Southern Division, in the above entitled cause;

Now, therefore, the condition of this obligation is such that if the above named plaintiff shall prosecute its said writ of error to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

T. W. JENKINS & CO.

A. Jenkins, Pres.

(Seal)

ALBERT JENKINS.

E. J. HALL.

Attest: E. B. LONDON, Secretary.

State of Oregon, County of Multnomah—ss.

On the 5th day of April, 1917, personally appeared before me Albert Jenkins and E. J. Hall, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged each for himself that they executed the same as their free act and deed for the purposes therein set forth.

And said Albert Jenkins and E. J. Hall, being respectively by me duly sworn, says each for himself and not one for the other that he is a resident and householder of the said county of Multnomah and that he is worth the sum of \$250.00 over and above his just debts and legal liability and property exempt from execution.

ALBERT JENKINS.

E. J. HALL.

Subscribed and sworn to before me this 6 day of April, 1917.

(Seal)

LAURA N. TAPSCOTT,

Notary Public in and for the County of Multnomah,
State of Oregon.

Com. expires Oct. 20-20.

The within bond is approved both as to sufficiency and form this 23rd day of April, 1917.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Original. No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Bond. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Stipulation for Transcript of Record.

It is hereby stipulated by and between the parties to the above entitled action that the transcript to be filed in the office of the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the writ of error heretofore perfected, shall include the following pleadings and papers, on file, to-wit:

1. The second amended complaint;
2. Defendant's demurrer to said second amended complaint;

3. A copy of the minute order sustaining said defendant's demurrer to second amended complaint;
4. Plaintiff's notice of refusal to amend;
5. The judgment and decree;
6. The order allowing writ of error;
7. Assignment of errors;
8. The bond;
9. Writ of error;
10. Citation;
11. The clerk's certificate;
12. This stipulation.

The said transcript may be filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, before the 22 day of May, 1917.

Dated May 2, 1917.

CARROLL ALLEN &
BERTIN A. WEYL,
Attorneys for Plaintiff.
DONALD BARKER,
Attorneys for Defendant.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Stipulation for transcript of record. Filed May 2, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

IN THE
**United States Circuit Court
of Appeals**

FOR THE
NINTH CIRCUIT

T. W. JENKINS & COMPANY, a Corporation,
Appellant,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF.

Upon Writ of Error to the United States District
Court, for the Southern District of California,
Southern Division.

BEACH, SIMON & NELSON,
710 Board of Trade Bldg., Portland, Ore.

ALLEN & WEYL,
219 H. W. Hellman Bldg., Los Angeles, Cal.,
Attorneys for Plaintiff and Appellant.

GRAY, BARKER & BOWEN,
Suite 1029, Title Insurance Bldg., Los Angeles, Cal.
Attorneys for Defendant and Appellee.

Filed

SEP 17 1917

F. D. Monckton,

Clerk



IN THE

**United States Circuit Court
of Appeals**

FOR THE

NINTH CIRCUIT

T. W. JENKINS & COMPANY, a Corporation,	}
Appellant,	
vs.	
ANAHEIM SUGAR COMPANY, a Corporation,	}
Appellee.	

APPELLANT'S BRIEF.

Upon Writ of Error to the United States District
Court, for the Southern District of California,
Southern Division.

STATEMENT OF THE CASE.

The writ of error in this case brings before the Appellate Court the judgment of the District Court for the Southern District of California, Southern Division, dismissing the Plaintiff's (Appellant's) Complaint to which a Demurrer had theretofore been sustained. The record is therefore brief and the question sharp and distinct.

The facts disclosed by the Complaint which were

held insufficient to state a cause of action may be epitomized as follows:

That the plaintiff had for many years been engaged in the wholesale grocery business and had an established business in buying, selling and dealing in sugar and kindred articles.

That in the ordinary course of plaintiff's business for many years its "requirements" of sugar during the month of August was in excess of 4800 bags and **that this fact was known to the defendant**, and that the defendant at the date of the hereinafter mentioned contract knew what amount plaintiff would require for its business in the month of August, 1914.

That in June, 1914, plaintiff and defendant entered into the following contract:

(Contracts subject to unforeseen acts of Providence, such as fire, earthquake, flood.)

San Francisco, Calif., June 13, 1914.

A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Company, party of the second part.

To-wit:

Party of the first part part sells and party of the second part buys August requirements bags fine granulated beet sugar at \$4.20 per bag less 2% cash 8 days, f. o. b. San Francisco, August shipment.

It being understood and agreed that party of the first part guarantees the price up to time of arrival against decline only to the basis of the C. & H. and Western Sugar Refining Co.

ANAHEIM SUGAR COMPANY.

Per Ariss, Campbell & Gault, Agts.,
Party of the 1st Part.

T. W. JENKINS & COMPANY,

Party of the 2nd Part.

That it eventuated that plaintiff's "requirements" of sugar for August, 1914, amounted to 4800 bags, but that notwithstanding demand for delivery thereof, the defendant refused to deliver in excess of 600 bags, thus compelling plaintiff, in order to procure its "requirements" for that month to purchase same in the open market at an advance of \$3.10 per bag.

A Demurrer (Transcript, pp. 13-16) was filed to this Complaint, subdivided with ingenious prolixity, into twelve or fifteen items, the burden of all of which, however, may be expressed as a contention that the contract is unenforceable because of uncertainty and ambiguity and the District Court sustained the Demurrer on the ground that the contract was void because of uncertainty and lack of mutuality.

The affirmative of the question, the resolution of which will, we believe, begin and end the Court's labors, we express as follows:

LEGAL POINT FOR DECISION.

A CONTRACT BETWEEN A AND B WHEREBY A AGREES TO SELL AND B TO BUY B'S "REQUIREMENTS" OF DESCRIBED ARTICLES AT A FIXED PRICE DURING A FIXED TERM IS MUTUAL AND BINDING IF B'S BUSINESS IS AN ESTABLISHED ONE AND HIS "REQUIREMENTS" REASONABLY DEFINITE AND ASCERTAINABLE OR KNOWN TO THE CONTRACTING PARTIES.

Lima Locomotive Co. v. Nat. Steel Castings Co.,
155 Fed. 77.

Marx v. Amer. Malting Co., 169 Fed. 582.

Manhattan Oil Co. v. Richardson, 113 Fed. 923.

Ramey Lumber Co. v. Schroeder Lumber Co., 237
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Walker Mfg. Co. v. Swift, 200 Fed. 529.

Sterling Coal Co. v. Silver Springs, 162 Fed. 848.

Klipstein v. Allen, 123 Fed. 992.

Cold Blast Trans. Co. v. Kansas City, etc., Co., 114
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Minnesota Lumber Co. v. Whitebreast Coal Co.,
160 Ill. 85.

Fuller v. Schrenk, 58 App. Div. 222.

Bartlett Springs Co. v. Standard Box Co., 16 Cal.
App. 671.

Wells v. Alexandre, 130 N. Y. 642.

Hickey v. O'Brien, 123 Mich. 611.

Dailey Co. v. Clark Can Co., 128 Mich. 591.

Grand Prairie Gravel Co. v. Wills Co. (Tex.), 188 S. W. 680.

Western Macaroni Co. v. Fiore (Utah), 151 Pac. 984.

Great Northern Ry. Co. v. Witham L. R. (C. P.), IX, p. 16.

R. C. L., Vol. VI, p. 62.

Cyc., Vol. IX, p. 329.

11 L. R. A. N. S., note p. 713.

ARGUMENT.

We are compelled to approach the discussion of this question without the aid of guiding precedents in the old books. Contracts of the character under examination are the outgrowth of the exigencies of modern business. Being thus more or less novel it is not surprising that early consideration of its prototypes did not result in uniform conclusions. The law of the subject is, however, gradually crystallizing and we believe the weight of authority, both as to number and power of reasoning, is indubitably in favor of sustaining the validity of the contract.

There are, however, certain important rules of construction, not of modern origin, which may be stated without the support of citations, as follows:

Contracts are to be given a reasonable construction.

Contracts are to be construed so as to support rather than nullify their provisions.

Our introductory statement may be taken as a concession that the law here involved is not so clearly and precisely defined as to justify a dogmatic statement.

This being true and the boast of the common law being its ability to grow, to fit, and to adjust itself to meet new conditions, it is of interest and importance to discern the *tendency* of the courts in the more recent decisions.

We earnestly believe that that tendency is toward the recognition of the sanctity of such contracts and toward the discouragement of quibbling and evasion.

We do not base our right to a recovery on the opinion or the authority (often anonymous) of articles in Digests or Encyclopaedias, because we realize that the weight of the views these express is derived solely from and is limited to the cases cited.

Their statements, however, as to *weight of authority*, etc., are not negligible in considering the *tendency* of the cases, and we therefore refer the Court to the expressions of two of the most reputable and reliable of these compilers.

Thus, one of the most recent works of the character mentioned, **Ruling Case Law**, discussing contracts of this character, points out, Vol. VI, page 62:

“The effect of indefiniteness as to quantity has often arisen in the law of sales, usually in connection with contracts to furnish the buyer all of a certain kind of goods which he may need in his business during a certain time, or in connection with contracts to purchase all the output of a certain factory during a certain time, the amount of the output being indefinite. While the courts are not entirely in accord

in reference to this question, such contracts are *not*, according to what seems to be the *weight of authority*, invalid for uncertainty. The quantity which is to be bought is made as definite as is possible under the circumstances." (*Italics ours.*)

And we have not found anywhere a clearer or more convincing statement of the law than that of the writer of the exhaustive editorial note on the subject in Volume 11, L. R. A. (N. S.) page 713, in the course of which he presents the following as his conclusion from a thorough examination of all the cases:

"The question of the validity of an accepted offer to furnish such material as one may need in his business, as affected by the objection of a want of mutuality, is one as to which much conflict exists among the courts. As a rule, however, the *later decisions* are inclined to obviate this objection by construing such contracts in the light of the surrounding circumstances and the situation of the parties at the time of the contracts; and if, by the aid of such surroundings, the quantity purchased can be made reasonably to appear, or is capable of an *approximately accurate estimate*; and the further fact also appears that the vendee is in a position where, in all probability, he will require in his business the commodities which are the subject of the contract, the courts are inclined to imply an agreement upon his part that he will purchase all of that commodity covered by the contract which he may need in his business; and further to *imply an agreement* upon his part that he will *continue* in the business in which he is then engaged, and continue to use and need the com-

modity mentioned in the contract during the period covered, thereby making the obligation mutual." (*Italics ours.*)

See also IX Cyc., page 329.

* * * * *

In view of the fact that the transaction involved is a commercial one, and is accordingly, as pointed out in *Marx v. American Malting Company*, 169 Fed. 582, governed by Federal rather than State authority, we proceed at once to a discussion of the

DECISIONS IN THE SEVERAL FEDERAL CIRCUITS.

One of the leading cases on the subject and the one of the two in fact principally relied upon by the defendant (and the Court below) is

Cold Blast Trans. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77 (C. C. A. 6th Circuit).

While Judge Sanborn, in that case, denied the right of recovery, a reference to subsequent cases will disclose the interesting fact that the decision of Judge Sanborn in the Cold Blast case has been most frequently referred to, strangely enough (upon first consideration) as authority for decisions *upholding* contracts of the character of the one now under examination. A study of the language of the opinion, however, renders clear the reason for the apparent paradox.

In the Cold Blast case there was a mere offer to deliver an **unascertained** quantity of goods at a stated price and an acceptance thereof without, however, any agreement to purchase either the "requirements" or any

portion thereof. The Court held the particular contract void and unenforceable because of indefiniteness and lack of mutuality of obligation, but took occasion to delineate with precision and force the limitations of the doctrine.

Judge Sanborn pointed out that a mere general promise to deliver specified articles at certain prices **without any agreement to order or accept** is without binding force or effect, because such promise lacks one of the essential elements of an agreement—certainty in the thing to be done. The upholding, however, of a contract such as the one in suit, is an **application** rather than a **contradiction** of this attribute of the necessity for certainty, and Judge Sanborn so points out in his opinion:

“Contracts for the future supply, during a limited time, of articles which shall be required or needed or consumed by an established business, or used in the operation of certain steamships or other machinery, are no exceptions to this principle, because they fall under the rule, *Id certum est quod certum reddi potest.*

* * * *An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time, from the party who makes the offer.”* (Italics ours.)

* * * * *

(The other case relied upon by Judge Bledsoe,

Crane v. Crane (C. C. A. 7th Circuit), 105 Fed. 869, will be more particularly referred to hereinafter.)

A similar question, but one more closely analogous to that here presented arose later in the same court (6th Circuit), and it had occasion to give careful consideration in passing thereon, to the prior decision in the Cold Blast case. We refer to the leading case of

Lima Locomotive Co. v. National Steel Castings Company, 155 Fed. 77, 11 L. R. A. N. S. 713.

in which the opinion was rendered by Mr. Justice Lurton, then a Circuit Judge.

The contract in the Lima case, as in the instant case, was one to furnish the "requirements," and the decision of a Circuit Judge grounded on a **mistaken application** of the Cold Blast case, was overruled in the following language:

"We find ourselves unable to agree with the learned circuit judge in respect to the non-mutuality of the contract by which the plaintiff agreed to supply all of the 'requirements' of the defendant's business for the remainder of the year 1902. The defendant was engaged in an established manufacturing business which required a large amount of steel castings. This was well known to the plaintiff, and the proposition made and accepted was made with reference to the 'requirements' of that well-established business. The plaintiffs were not proposing to make castings beyond the current requirements of that business, and would not have been obligated to supply castings not required in the usual course of that business. By the acceptance of the plaintiff's proposal, the defendant was obligated to take from

the plaintiff all castings which their business should require. *The contract, if capable of two equally reasonable interpretations should be given that interpretation which will tend to support it and thus carry out the presumed intent of both parties.*" (Italics ours.)

And in the more recent case of

Marx v. American Malting Company, 169 Fed. 582, the Circuit Court of Appeals for the same Circuit, construing a contract to supply the Malting Company with its "requirements" of certain raw material for a definite period at a definite price, said:

"Contracts for the supply of material to be used in a certain business for a certain time limited, or for the purchase of the entire output of a certain plant or manufactory, for a certain time or season, are valid; this specification of the quantity contemplated by the parties is held to be sufficiently certain; that the certainty can be ascertained from the means to be supplied by the future exercise of the business in good faith and in the normal manner of such business."

Manhattan Oil Co. v. Richardson, (C. C. A. 2nd Circuit) 113 Fed. 923.

Here the contract was one whereby the defendant agreed to sell and the plaintiff to purchase all the oil it might require for its own use for a period of 12 months from the date of the contract. This contract the Court sustained, the pertinent language of the opinion being as follows:

"It is insisted for the Manhattan Oil Company that the contract was invalid for want of mutuality, and consequently that the trial judge should have directed a verdict for the defendant. If the contract did not obligate the plaintiff to take any specified quantity of oil, manifestly there was no consideration for the promise of the defendant. But in consideration of the defendant's promise to sell, the plaintiff promised to buy all the oil it should require for its own use for a specified period of time. Read in the light of the previous business relations of the parties, it is plain that by this was meant that it should buy what oil it should require for its use in its manufacturing business. *This is a very different promise from one to buy what it might desire, or from a mere option to buy. If it had bought oil from any other dealer for use in its business during the 12 months, its promise would have been broken, and the defendant could have recovered damages for any loss accruing.* The mutual obligation of the parties to perform the contract constituted a consideration for the promise of each. It is quite immaterial that the quantity of oil to be sold and bought was not definitely determined at the date of the contract, but was to be ascertained by extrinsic evidence." (Italics ours.)

Ramey Lumber Co. v. Schroeder Lumber Co., (C. C. A. 7th Circuit) 237 Fed. 39.

The defense interposed in this case was with regard to indefiniteness of quantity and lack of mutuality. The Court disposing of the contention said:

“As to the defenses of uncertainty and want of mutuality, we are unable to concur in the decision of the trial court. The contract did not lack mutuality of obligation. While defendant promised to buy of plaintiff all the lumber of a certain quality that plaintiff might own during the season, plaintiff bound itself, if it did manufacture or acquire any such lumber, to sell all of it to defendant and to no one else. Thus plaintiff deprived itself of the right to sell lumber to whom it pleased. The promise to restrict its freedom by giving up its right to sell to others was real and definite. It was the substantial and contemplated consideration for defendant’s promise to buy all that plaintiff might own during the season. There was the mutuality of obligation essential to a bilateral contract; there was the consideration essential to the validity of any contract. That the plaintiff did not bind itself to acquire or manufacture any such lumber is immaterial. Its promise to deal with defendant was the valid consideration for the obligation by defendant—a consideration that made the undertaking of the other party binding and enforceable.

With regard to the question of uncertainty, a contract is void (save for the possibility of reformation in equity) because of uncertainty, only when it is so worded that the intention of the parties cannot be deduced therefrom. *If the intention be clear, the mere uncertainty of the amount involved does not invalidate the obligation, however it may affect the possibility of proving damages for a breach.*” (Italics ours.)

Golden Cycle Mfg. Co. v. Rapson, etc., Co., 188
Fed. 179 (C. C. A. 8th Circuit).

The Court (Justices Vandeventer, Hook and Carland sitting) quoted the following excerpt from the Cold Blast case (*supra*):

“An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer.”

And declaring its approval of the doctrine there announced, applied it to the contract in the case before it, which was one for the purchase of the coal the mine would use during a certain period, the word “use” being construed by the Court in the sense of “need,” “require,” or “consume.”

* * * * *

See also

Walker Mfg. Co. v. Swift, (C. C. A. 5th Circuit)
200 Fed. 529.

Sterling Coal Co. v. Silver Springs, (C. C. A. 1st
Circuit) 162 Fed. 848 (to which case further reference will hereafter be made).

Klipstein v. Allen, (Circuit Court Northern District, Georgia,) 123 Fed. 992.

A WELL-REASONED ILLINOIS CASE.

For reasons previously stated we have omitted any reference to the many apposite decisions in the State Courts, but we invite the Court's attention to the very excellent and instructive discussion by Mr. Justice Magruder in the case of

Minnesota Lumber Co. v. Whitebreast Coal Co.,
160 Ill. 85.

Because of the clarity of that opinion it has become a respected precedent and we accordingly quote from it somewhat at length (the facts sufficiently appearing in the quoted portion) :

“It is said by counsel for appellant that the amount of quantity of appellant's ‘requirements’ of anthracite coal for the season of 1886-1887 is not fixed by the contract, and that, for this reason, it is wanting in certainty; and that the contract does not bind appellant to ‘require’ any coal, and for this reason is wanting in mutuality.

Contracts should be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The circumstances which both parties had in view at the time of making the contract may be referred to for the purpose of determining the meaning of doubtful expressions. Courts will seek to discover and give effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and greater regard is to be had to their clear intent than to any particular words

which they may have used to express it. The parties representing the companies who entered into the contract of August 4, 1886, were practical business men. The word 'requirements' as used by them, evidently meant the amount or quantity of coal which appellant would need in its business for the specified season. Appellant agreed to buy such anthracite coal as it should need in its business for the season of 1886-1887, of appellee at a certain price per ton, and appellee agreed to furnish said amount of coal, free on board the cars at Chicago or Milwaukee, at said price per ton, as it should be ordered by appellant during said season.

The plea avers that defendant was engaged in the purchase, use and sale of coal in its business, and that its requirements therein for that season were very large, and that such fact was well known to the plaintiff. The parties will be presumed to have contracted with reference to the knowledge which they then had upon that subject, and upon the supposition that appellant would need the same quantity of coal which it had theretofore been in the habit of using. The word 'requirements' evidently had the same meaning as the word 'needs.' The amount of coal which was 'required' for the business of that season was the amount of coal which was 'needed' in the business of that season.

If the word 'requirements' as here used, is so interpreted as to mean that appellee was only to furnish such coal as appellant should require it to furnish, then it might be said that appellant was not bound to require any coal unless it chose, and that therefore there was a want of mutuality in the contract. But the rule

is that where the terms of a contract are susceptible of two significations, that will be adopted which gives some operation to the contract, rather than that which renders it inoperative.

A contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties, unless such construction is wholly negatived by the language used. It cannot be said that appellant was not bound by the contract. It had no right to purchase coal elsewhere for use in its business, unless, in case of a decline in the price, appellee should conclude to release it from further liability."

(It is worthy of note that Judge Sanborn in the Cold Blast case (*supra*) cites the Whitebreast case with apparent approval.)

See also:

Fuller v. Schrenk, 58 App. Div. 222, 64 N. E. 1126.

Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671.

PSEUDO-DISTINCTION UNDER WHICH RECOVERY WAS DENIED.

These authorities—and they fairly represent the current of opinion—seem amply to establish the validity of the contract. But the District Court permitted the defendant to evade the obligation thereof on the theory that a distinction subsists between a contract for the "requirements" of some species of raw material entering into a **manufactured** product and a contract for the

“requirements” of the same raw material by a **wholesale grocery firm**. In fact we understand from the Brief of Counsel for defendant in the lower court that they concede that if the plaintiff were a candy manufacturing concern, the contract in the instant case would have been enforceable!

The distinction is ingenious but will, we believe, upon examination be found to be **sophistical**. It is based primarily on **presumptive dishonesty of contracting parties** and on **pusillanimity of courts**. That this observation is not overdrawn will be manifest upon consideration of the bifurcated argument for the distinction:

(a) A manufacturing concern will continue to use its “requirements” of raw material entering into its finished product independently of market fluctuations—it will not go out of business in order to procure the purchases stipulated for in the contract.

(b) The “requirements” of raw material by a manufacturing plant are regular in amount and easily ascertainable while the same requirements of a wholesale concern are conjectural and can be made heavy on an advancing market, or light on a declining one.

* * * * *

The first proposition, i. e., that a manufacturing concern will not go out of business in order to eliminate or cut down its requirements, stated as a distinction, involves the supposition that a wholesale concern can or will go out of business in certain lines, e. g., the staple and fundamental one of sugar! Does such an argument appeal to this Court as a basis for nullifying a contract

entered into in good faith between a reputable established wholesale house and the manufacturer from whom and it anticipates its requirements in a most staple branch of its business?

Mr. Justice Holmes, sitting in Circuit, manifested little patience with a similar argument, although in the case referred to—that of *Sterling Coal Co. v. Silver Springs*, 162 Fed. 848—it was advanced as to a manufacturing concern, Mr. Justice Holmes' animadversion is no less applicable here.

The "right" to go out of some particular branch of business was referred to by that incisive Jurist as a "purely theoretical freedom."

The contention so made admits the validity of such contractual provisions if made on behalf of *factories* but denies their validity to *wholesalers*. In other words by this process of reasoning the word "*factory*" is to become a new shibboleth in the law of contracts. If Jenkins & Company operated a candy factory the defendant admits that it (defendant) would have to live up to its agreement, notwithstanding the rise in the market price of sugar, but Jenkins & Co. being only a wholesale concern the contract is not to be binding on the defendant if it eventuates that it will lose money thereunder. We invite the Court's analysis of the situation thus presented.

Taking the illustration suggested by the defendant's argument: About ninety-five per cent of the material used in making candy is sugar. In the cheaper grades the price of sugar represents about eighty per cent of the manufacturing cost of the finished article. Take the case of a manufacturer specializing in so called "French" candy at ten cents per pound, based on a cost of sugar to him of seven cents per pound

secured under a contract for "requirements." Sugar then drops to four cents per pound, enabling his competitors purchasing at that figure to sell the finished product at seven cents per pound. If the possibility of the intervention of sordid motives is to be the determining factor in the law of contracts, how absurd to say that the candy manufacturer would not have the same inducement to eliminate or cut down its business as would the wholesale house! Verily "spurious" and "theoretical" are apt terms to apply to such distinctions. We venture to say that in either case the purchaser would and should be held bound to take what a properly instructed jury would find to be its "requirements" based on its past history in the light of present market conditions of supply and demand, and this is precisely what the Courts have done, as we shall hereafter point out.

* * * * *

The second phase of the "distinction," i. e., that the requirements of raw materials by a manufacturing plant are regular, while those of a wholesale plant are conjectural and can be made to change with market conditions as to price, is illogical in no less degree than the first. The illustration already cited—the candy factory—makes this clear without comment.

As a matter of fact the two contentions are in reality one and amount to a statement of the converse of the Legal Point in which we summarize our case, as expressed under the heading "Legal Point for Decision," at the outset of this brief. This negative or converse statement is equivalent to saying that a contract for requirements of some particular merchandise if made on behalf of a business **not** established and in which the amount to be used is purely **speculative** and

without guiding precedent, and where **no** obligation rests upon the purchaser to take any amount whatsoever, is uncertain, unilateral and void. This, we concede, but it is utterly inapplicable to the case at bar.

The test of the validity of such contracts is furnished by the answer to the question:

Are the requirements reasonably certain of ascertainment within fair limits of fluctuation, and is there an obligation to purchase?

It is quite possible that under ordinary circumstances a factory may have less inducement for minimizing its "requirements" of some one particular variety of raw material than a wholesale concern with regard to one branch of merchandise, but if this be conceded, it does not involve or justify a conclusion that the *rights* of parties are to be absolutely determined by the answer to the question of whether the purchaser is a manufacturer or a dealer.

The error of the lower Court inhered in its assumption that the test lies in the applicability of the terms "manufacturer" or "dealer," whereas the real logical distinction lies deeper. The lower Court simply confused an *illustration* of a theorem with the theorem itself.

The lower Court was probably misled by the fact that in one or two cases it is intimated that the contract there passed on being one of a "factory" for a portion of its material would be upheld and then by way of comparison adding *dicta* to the effect that the case would have been different if it had been a contract by some dealer for part of his merchandise. We assume that the distinction thus suggested did not arise from any predilection for factories, but because of a belief

on the part of the Judge employing the comparison that the elements of uncertainty and mutuality were present to a greater extent in the naked instances suggested than in the case of a factory. If, however, the word "factory" is not a shibboleth, it follows that if the "requirements" of a *dealer* are as nearly capable of approximate estimation as those of a *manufacturer*, and if the contract is such that the temptation to eliminate any "requirements" is removed, the reason for the distinction, and necessary the distinction itself, falls. *That is precisely the case here made.*

In the first place it is admitted on Demurrer that defendant *knew* the approximate "requirements" of the plaintiff. So much for the quantity ordinarily taken and which might within reasonable limits ordinarily be expected to be taken.

Again, the temptation to cut down "requirements" because of a falling market, deemed by the lower Court fatal, was *expressly eliminated* by the contractual provision (overlooked or disregarded by the lower Court):

"It being understood and agreed that party of the first part guarantees the price up to time of refusal against decline, etc." (Transcript of Record, p. 7), to the basis of the price charged by the Anaheim Company's principal competitors.

Under such circumstances the decision of the lower Court amounts to a judicial declaration that in no conceivable situation may a wholesale concern contract in advance for its requirements unless it can fix precisely the number of packages and pounds it will need. Surely such contracts are not against public policy. Why, then, are they void?

If a manufacturer like the Anaheim Sugar Company in order to get the exclusive business of a concern like Jenkins & Company, is willing to pledge itself to furnish Jenkins & Company's requirements at a fixed price and guarantee to lower it if the market falls, in consideration of Jenkins & Company's agreement to purchase its requirements exclusively from the Anaheim Company, what principle of law or morals is so violated as to nullify the contract?

The mere absence of a specification of exact quantity is not a controlling consideration. This characteristic inheres in many species of contracts, the validity of which has never been doubted. Thus a contract to take the output of a sawmill or other plant, is binding notwithstanding the impossibility of gauging in advance the precise measurements of the product; similarly as to contracts to supply certain articles to one who agrees to handle and push them, the agreement for services (like the agreement for exclusive purchase here), furnishing the consideration, and the contract being valid, notwithstanding the absence of limitation on quantity.

Meier Dental Mfg. Co. v. Smith, (C. C. A. 8th Circuit) 237 Fed. 563.

While the facts in the case at bar are not the same, the principle involved is in no essential element different from such instances, or from cases like

Conley Camera Co. v. Multiscope Film Co., (C. C. A. 8th Circuit) 216 Fed. 892.

in which a contract by a camera manufacturer to sell cameras at a fixed price to a dealer having an established trade was held to be valid notwithstanding the absence of a specification as to particular quantities, the

agreement to handle (like our agreement of exclusive purchase), furnishing the consideration.

Under the contract in the instant case, Jenkins & Company bound itself to purchase exclusively from the Anaheim Company. This furnished a valid consideration for the promise of Anaheim Company to furnish Jenkins' requisites at a stated price. Not only was Jenkins inhibited from purchasing elsewhere, but the Anaheim Company could *compel* the purchase of the ordinary and reasonable requirements of Jenkins, or procure damages for the failure to make such purchase.

The obligation is thus not unilateral, but reciprocal. Jenkins & Company was just as much bound to buy its requirements from the Anaheim Company and to make its normal purchases, as the Anaheim Company was bound to supply its requisites.

Loudenback Fertilizer Co. v. Tenn. Phosphate Co.,
(C. C. A. 6th Circuit) 121 Fed. 298.

Indeed so firmly is this obligation fixed that the purchaser cannot evade his agreement to buy his requirements by transferring his business. The contract cannot be avoided by retirement:

Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142.

Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241.

This principle is clearly expressed in the excellent editorial note hereinbefore referred to, 11 L. R. A. (N. S.) 717:

"Acceptance of the offer binds the acceptor to need substantially the same amount of commodities in the future as in the past; and he cannot escape this ob-

ligation by a change in his business which will appreciably affect his needs; in other words, he impliedly contracts that he will conduct his business in the future, in a manner substantially similar to the way he is conducting it at the time of the contract," citing many cases.

And that such was the construction placed upon the parties upon their relative duties and obligations is clearly shown by the fact that in the contract in the instant case, Jenkins & Company protected itself by the insertion of a provision guaranteeing it as to price against a decline in the market.

Certainly no stronger term than "requirements" could be used. Weighty consideration should, we believe, be given to the fact that the language of the contract in the instant case is not merely that the defendant agrees to supply the sugar which the plaintiff might "require" during the period mentioned, but that plaintiff "buys" (present tense) its "*requirements*" of the defendant during said period.

Even had the word "require" been used, it is apparent that under the circumstances of the case, the Court following the established canons of construction, hereinbefore referred to, would construe the word "require" so as to cover what the plaintiff would ordinarily use, and if the plaintiff, under such circumstances, bought sugar elsewhere during the period covered by the contract, the defendant would have had a clear right to recover damages. In other words, as well pointed out by the writer in Cyc. (*supra*), the "freedom of action" of the plaintiff was limited and this furnished a consideration.

But the contract under examination obligates the

plaintiff to purchase from the defendant its "*requirements*," and while the word "require" is sometimes used synonymously with merely "asking," the word "requirements" has a clear and definite significance in such a context and means "requisites." It is undoubtedly a word of strong significance in such a context. If, as the Amended Complaint alleges, the plaintiff had an established business in sugar and the extent of its business was capable of reasonable estimation and was regular and not sporadic, then its "*requirements*" was a certain and definite thing within the law of contracts.

It was unquestionably this added significance which was had in mind by the Illinois Court in the case of **Russell v. Excelsior**, 120 Ill. App. 23-33:

"The contract in question is for the appellee's *requirements* in stove bolts from December 14, 1898, to January 1, 1901, and this means such an amount of bolts as the appellee should need in the regular course of its business and not what appellee might choose to *require* from the appellant." (Italics ours.)

A study of Judge Bledsoe's opinion in the Court below, will disclose, that while he clearly comprehended the *rationale* of the distinctions rendering some contracts of the general nature discussed valid and others void, he failed utterly to apply the apt tests to the *facts* before him, but deemed the applicability of the opprobrious term "dealer" to Jenkins & Company, conclusive of its rights and remedies. He failed utterly to take into account the fact that Jenkins & Company had carefully safeguarded itself against

(a) The charge of "lack of mutuality

of obligation" by agreeing to confine its purchases to the Anaheim Co.;

- (b) The charge of "uncertainty" by alleging its normal requirements and averring the Anaheim's knowledge of its past and prospective needs;
- (c) The charge of inducement to eliminate any "requirements" if prices fell by stipulating for protection in the event of such a contingency.

That each and all of these elements of the contract under examination were overlooked, and that the "deep damnation" of the generic term "dealer" rendered him oblivious of the fact that the "dealer" in the particular instance had been shorn of his fatal attributes of uncertainty, of lack of mutuality, and of his ordinarily sordid proclivities, is evident from the following characteristic quotation:

T. W. Jenkins & Co. v. Anaheim Sugar Co., 237 Fed. 278:

"At the very threshold of the present case, however, we are met by the fact that the business of plaintiff is not that of manufacturing, or of similar import, in which its use of sugar would form but an incident of its general business, but it is that alone of selling sugar and other articles at wholesale. It buys such sugar, presumably, only as it can sell at a profit at current market prices, and it refrains from buying sugar which, because of a fall in price, it will be unable to sell, except at a loss to itself. Here the presumption which is indulged in and is referred to in

many of the cases cited has no application or play, because of the fact that the purchase and use of the commodity in question becomes, under such circumstances, not an incident to the main business of the purchaser, but the main business itself. Any fluctuation in the price of the commodity, especially if of generous proportions, as in the case at bar, inevitably affects the use of the commodity by the purchaser, and tends to negative the presumption that the business will continue substantially as intended by the parties. In this view of the case, the supposed 'requirements' of the plaintiff in its wholesale business are not the requirements of an established manufacturing or similar business, as the phrase is used in the reported cases. Presumably plaintiff, during a given period, will 'require' in its business just the amount of sugar it can sell. It will sell the amount of sugar it can dispose of at a profit; the greater the profit, the more it will dispose of; if it can dispose of none at a profit, it will require none.

"The situation can be stated concretely in a few words; plaintiff had contracted for all the sugar it would 'require,' meaning, of course, in its particular business, all it could sell, at the fixed price of \$4.20 per bag. Before the contract became operative, the price of sugar in the market rose to \$7.30 per bag. It needs no argument to show that, with an unlimited supply — its 'requirements' — at \$4.20, there would be brought into play no particular effort or business sagacity on the part of plaintiff to effect sales at a handsome profit with the general market price firm at \$7.30. To presume that it would not so conduct itself is to go counter to

human experience. On the contrary, if the market price had fallen considerably, plaintiff would have refused to sell, save at a profit on its own purchase price, in which event none would have been so foolish as to buy, or it would have instructed its solicitors that it had no sugar at all to sell. In either event, its 'requirements' would have been the same, to-wit, practically nil. It would have bought no sugar from third persons, and would therefore have committed no breach of its engagement with defendant. To presume otherwise would be to disregard the most obvious motives of self-interest."

The reasons which led to Judge Bledsoe's conclusion are thus apparently:

1. Plaintiff's requirements are indefinite.

2. If the price rose plaintiff would sell an "unlimited supply"—its "requirements"—; if the price fell it would "instruct its solicitors that it had no sugar at all to sell."

"To presume otherwise," says Judge Bledsoe, "would be to disregard the most obvious motives of self-interest."

But "to indulge such a presumption" it may fairly be replied, "would be to disregard the admitted facts of the case," i. e.

1. Plaintiff's "requirements" were those of an established business with a

standing trade and were approximately known to defendant.

2. A fall in price would not constitute an inducement to discontinue selling because plaintiff was protected under the contract against a decline.

But, Judge Bledsoe argued, in the event of a sharp rise plaintiff could sell "an unlimited supply," which he treated as synonymous with "requirements."

We do not believe that if Judge Bledsoe were instructing a jury he would so advise them. He would, in construing the contract, tell the jury that the word "requirements" means the supply ordinarily utilized by Jenkins & Company under normal conditions with reasonable allowance for increase or decrease dependent upon the activity or sluggishness of market conditions, and that Jenkins & Company would have no right to mulct the Anaheim Company in damages by endeavoring to force delivery of enormous quantities in excess of its ordinary business in order to reap an exorbitant profit from adventitious circumstances. Judge Bledsoe's argument well illustrates the attitude we have referred to before as the theory of the "pusillanimity of courts." We submit that courts are not thus powerless to prevent the perpetration of fraud. The province of the court in thus instructing the jury as to limitation on orders arising from high prices is well illustrated in the case of **Dailey Co. v. Clark Can Co.**, 128 Mich. 591.

These are not matters to be passed on, on Demurrer. They are for submission to the jury under proper instructions. It did not occur to Jenkins & Company to attempt any such imposition, and we may add that it did not occur to counsel for Jenkins & Company that

any such imposition could be practiced on any American tribunal, Judge Bledsoe's fears notwithstanding.

As pointed out in the Whitebreast case, *supra*, the Court would so construe the word "requirements" as to carry out the intent of the parties, i. e., the normal business needs and **not** an "unlimited supply." If anything is to be read into a contract the Court will read into it a limitation of reasonableness, and not one of oppression, and Judge Bledsoe's opinion founded as it is upon the theory of oppression and the Court's powerlessness to prevent it, is evidently, we respectfully urge, based on fundamental error.

The Complaint alleges that the actual August requirements of Jenkins & Company for 1914 were 4800 bags, not a bag in excess of its normal requirements known to the Anaheim Company and this *notwithstanding the very condition of sharp advance conjured up by Judge Bledsoe.*

The proof will show the desire of the Anaheim Company to procure Jenkins & Company's exclusive business; the offer with knowledge of Jenkins & Company's approximate requirements; the acceptance; the omission of Jenkins & Company in reliance upon the contract, to procure its necessities elsewhere; the orders for the requirements; the rise in price and the squirming of the Anaheim Company when it developed that the bargain would be a bad one for it.

If we do not show these facts we will fail; if we do establish them, then we have complied with every condition imposed by the Cold Blast and the Crane cases, and the reasoning for the distinction between the dealer and manufacturer being thus obviated, the dis-

inction ceases to exist in conformity with the ancient maxim

Cessante ratione, cessat lex ipsa.

We have referred to the fact that the references to "dealers" in the decided cases occur in illustrative *dicta* involving hypothetical facts differing radically from those in the case at bar. In truth, perhaps the only case to be found in the Federal Reports in which a dealer was clearly a party is that of **Crane v. Crane** (7th Circuit), 105 Fed. 869. The Crane case is the other one of the two cases on which Judge Bledsoe relied and in so doing, he overlooked the very obvious distinction between that case and the instant one which is pointed out in the particularly full discussion of the subject found in the case of

Grand Prairie Gravel Co. v. Wills Co., (Tex.) 188 S. W. 680.

in which the Court said:

"A careful perusal of the facts in this case (referring to **Crane v. Crane**) discloses that the contract, which was verbal, lacks one vital feature, the effect of which is to destroy its mutuality and deprive it of the elements of consideration. By its terms it attempts to bind the defendant to furnish to plaintiffs all the dock oak required by them for their use in the Chicago market during the year 1897, but it does not bind the plaintiffs to purchase oak from the defendant alone. *The plaintiff was at liberty, under the contract, to buy elsewhere, if the prices of such lumber were more favorable to him, and the defendant would be without remedy.*" (Italics ours.)

There was indeed no averment in the Crane case of the vendor's *knowledge* of the purchaser's requirements, and no averment that the purchaser had an *established* business. Had the purchaser been a manufacturer, in the Crane case, the conclusion would have been in no wise different, under such circumstances. This fact is strikingly illustrated in the Cold Blast case (*supra*) in which the purchaser was a manufacturer, but the contract was held to be without validity because he had *not* bound himself to purchase his "requirements." The analogy is so attenuated that it is not surprising in view of his use of the Cold Blast and Crane cases as binding precedents, that Judge Bledsoe reached an erroneous conclusion.

Judge Bledsoe was apparently deterred by the fact that so far as he could find, the well reasoned case of Minnesota Lumber Co. v. Whitebreast Coal Company, *supra*, was the only one in which a "requirement" contract had been upheld as to dealers, while the validity of such contracts had been denied as to dealers by the Cold Blast and Crane cases. We believe we have demonstrated indisputably that the Cold Blast and Crane cases properly studied justify no such conclusion. No case has, so far as we can discover, been decided in the Federal or State Courts, since the advent of modern business conditions, in which the validity of such an agreement with a dealer has been denied, where the requirements, as here, were *measurably ascertainable* and the dealer agreed to *limit his purchases* to the contracting vendor. Nor in reality is the Whitebreast case the only one affirmatively upholding the validity of these dealers' contracts. See *inter alia*:

Grand Prairie Gravel Co. v. Wills Co., (Tex.) 188 S. W. 680. (Decided with full appreciation of the Whitebreast and Crane cases.)

Western Macaroni Co. v. Fiore, (Utah) 151 Pac.
984. (Decided on the authority of the Cold
Blast case.)

Ramey Lumber Co. v. Schroeder Lumber Co., 237
Fed. 39.

* * * * *

In conclusion we submit that the decision of the Circuit Court of Appeals for the Ninth Circuit, in this case, will be of vast importance to the commercial interests of the United States for the reason that contracts of the character before the Court are so eminently appropriate and useful as to be now almost universal, and as the decision of an authoritative tribunal in a case of novel impression, it will largely determine whether or not wholesale dealers, under proper circumstances, may transact their business with real protection as to reasonably prospective requirements, without fear that the performance of the agreement will be left to the cupidity or even the tender mercy of the vendor.

Respectfully submitted,

BEACH, SIMON & NELSON,

ALLEN & WEYL,

Attorneys for Appellant.

5014

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

T. W. Jenkins & Company, a
Corporation,

Plaintiff in Error,

vs.

Anaheim Sugar Company, a
Corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION.

Filed

OCT 1 - 1917

DONALD BARKER,

Attorney for Defendant in Error.

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STATEMENT OF THE CASE.

The plaintiff in error above named has served upon us an instrument entitled "Appellant's Brief." This brief commences with what purports to be a "Statement of the Case." This statement in some respects needs supplementing, and in others needs altering, in order that the same may be made to fairly present the issues involved on this appeal. The statement is, therefore, controverted within the meaning of the court's

rule and a statement of the case will be herein set forth. For purposes of brevity, the plaintiff in error and the defendant in error will be designated hereinafter as plaintiff and defendant, respectively, they having been plaintiff and defendant in the court below.

The record discloses that a demurrer of the defendant to the second amended complaint of the plaintiff was sustained by the court below, and that, the plaintiff having refused to amend, judgment was entered in favor of the defendant. The plaintiff thereafter sued out its writ of error. The facts for consideration by the court are simply those which were well pleaded by the complaint. Among other things, it is alleged in the complaint:

That the plaintiff, an Oregon corporation, engaged in buying and selling and dealing in sugar and kindred articles, and the defendant, a California corporation, engaged in the business of manufacturing and refining sugar, entered into the following agreement, to-wit:

“(Contract subject to unforeseen acts of providence, such as fire, earthquake, flood.)

San Francisco, Calif., June 13, 1914.

“A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Company, party of the second part.

“To-wit:

“Party of first part sells and party of second part buys August requirements bags fine granulated beet sugar at \$4.20 per bag less 2% cash 8 days, f. o. b. San Francisco, August shipment.

“It being understood and agreed that party of the first part guarantees the price up to time of arrival.

against decline only to the basis of the C. & H. and Western Sugar Refining Co.

ANAHEIM SUGAR COMPANY.

Per ARISS, CAMPBELL & GAULT, *Agts.*

Party of 1st Part.

T. W. JENKINS & COMPANY,

Party of 2nd Part."

That the plaintiff, in conducting its business, was accustomed to contract with a producer for sugar and, thereafter, make sales thereof, and that this was known to the defendant at the time of the making of the aforementioned contract.

That after the making of said contract, to-wit, during July and August, 1914, the plaintiff took orders for 4800 bags of sugar for August, 1914, delivery.

It is also alleged that the plaintiff had required in excess of 4800 bags of sugar during the month of August for many years previous.

It is further alleged that the defendant, at the time the contract was entered into, knew what the plaintiff's requirements for sugar would be during the time of said contract.

That plaintiff ordered from the defendant during August, 1914, 4800 bags of sugar, but that the defendant refused to deliver in excess of 600 bags.

In conclusion plaintiff alleges that it bought in the open market, at the prevailing market price, 4200 bags of sugar for delivery to its customers, and that by reason of the premises, etc., it has been damaged in the sum of thirteen thousand and twenty dollars.

The demurrer which was sustained does not, as stated by counsel for plaintiff in error, merely express the "contention that the contract is unenforceable because of uncertainty and ambiguity." The demurrer will be found in the record, and speaks for itself. It alleges, disjunctively, as its grounds, in substance, that the complaint does not contain facts sufficient to constitute a cause of action; that the complaint is uncertain; that the complaint is ambiguous, and that the complaint is unintelligible.

There is, therefore, presented for the consideration of this tribunal these questions:

Does the complaint state facts sufficient to constitute a cause of action?

Is the complaint uncertain, ambiguous or unintelligible?

The determination of these questions will necessitate a consideration and determination of the questions whether the aforementioned so-called contract is void for lack of mutuality of its obligation or because of uncertainty or ambiguity, and, further, assuming its validity, whether a cause of action for its breach has been properly stated.

These questions may properly be considered under three general heads:

POINT 1. The alleged contract providing for the sale at a fixed price to a purchaser of his "August requirements" of sugar for resale by him is void for want of mutuality of obligation.

POINT 2. The alleged contract providing for the sale at a fixed price to a purchaser of his "August requirements" of sugar for resale by him is unenforceable and void because it is uncertain, ambiguous and unintelligible.

POINT 3. The complaint is uncertain, ambiguous and (or) unintelligible.

Authorities.

- Crane v. Crane, 105 Fed. 869;
American Cotton Oil Co. v. Kirk (C. C. A.),
68 Fed. 791;
Tarbox v. Gotcian, 20 Minn. 139;
McIntyre etc. Co. v. Jackson Lbr. Co. (Ala.),
51 So. 767;
Hugens v. Southwest etc. Co. (Ga.), 48 S. E.
933;
Higbee v. Rust (Ill.), 103 Am. St. Rep. 204;
Walker etc. Co. v. Swift & Co., 200 Fed. 529,
43 L. R. A. (N. S.) 730;
Krause v. Greenfield (Ore.), 123 Pac. 392;
Plumb v. Hallaver, 130 N. Y. Suppl. 147, 145
App. Div. 20;
Cold Blast etc. Co. v. Kansas City etc. Co., 114
Fed. 77;
R. C. L., 6th Vol., page 647;
R. C. L., 6th Vol., page 689;
43 L. R. A. (N. S.) 730.

Argument Upon Points 1 and 2.

The question of the validity of contracts of this kind has been before the courts, both state and fed-

eral, of the United States before. This case is, therefore, not one of first impression. On the contrary, the question has been presented from so many different angles that counsel for plaintiff in error have permitted themselves to lose sight of the essentials and to confuse shadow with substance. The difficulty has arisen through the efforts of counsel, and indeed of a few courts, to apply the letter of the law as announced rather than its spirit.

Probably one of the most elementary principles of the law of executory contracts is that which requires that an agreement must be mutual in its obligation in order to constitute a contract. In the case of contracts wholly executed, this element is not needed, which is likewise true in the case of a contract wholly executed by one party, such as an option agreement whereunder the holder has paid the consideration which binds the vendor. Until, however, a contract is executed, the obligation must be mutual or it is not a contract.

Therefore, if any executory agreement is not mutually binding upon the parties thereto, it is void and unenforceable as a contract.

When the contract declared upon by the plaintiff in the case at bar is put to the test of this principle, it is found wanting, and this without reference to the question of its indefiniteness and ambiguity. The contract attempts to bind the seller to sell and deliver, at a fixed price, to the buyer, all sugar which the buyer will require for resale during August, 1914. If the amount of sugar that the plaintiff would require for

resale during August, 1914, was wholly incapable of reasonable ascertainment at the time this so-called contract was executed, the contract is void because it is too vague and indefinite to be enforceable. If, on the other hand, such amount was capable of reasonable ascertainment at the time the contract was entered into and was known, the alleged contract is void for want of mutuality because of the obvious reason that the failure or omission to stipulate this amount was entirely due to a desire and intention on the part of the plaintiff not to be bound to buy the particular, or any, amount of sugar if the price should drop or the demand therefor abate during said month.

One or the other of these alternatives was the case. There is not much choice. A brief discussion of these propositions separately might aid the court in weighing their respective merits.

Was Amount Ascertainable and Known?

We submit that it was not only not known at the time the contract was entered into, but that it was not capable of reasonably accurate ascertainment at that time. If the sugar had been intended for consumption by the plaintiff during the month of August, 1914, it might very well be said that the amount thereof was capable of reasonable ascertainment, for, in that case, the history of the past experiences of the plaintiff could be used. Its requirements for the month of August in previous years, or the monthly amount required during a short period previous to the making of the contract, or the average monthly amount needed during the preceding period of one or two years, ac-

cording to the nature of the business and the effect of the seasons and other influences upon the demand, might be the basis for the estimate. In any event the ascertainment in advance of the monthly needs would only be possible because the article needed was for *consumption* in an established business. The same is not true where the article is intended for *resale*. In that case it may or may not be needed. It is entirely immaterial what the plaintiff actually did in this case *after* the execution of this agreement. The test is not what the plaintiff *did*, but what the plaintiff *could have done* under this so-called contract. If the plaintiff could have refused to order or receive any sugar from the defendant without liability, the amount can not be said to have been ascertainable and known. This is but the converse of a statement at page 24 of the brief of plaintiff in error. It is there asserted that the defendant could have compelled the purchase of the ordinary and reasonable requirements of the plaintiff or procure damages for its failure to make such purchase. This statement necessarily is based upon the assumption that the amount of the plaintiff's needs were known at the time the contract was executed. If this amount was known, and the contract was otherwise valid and enforceable, there is, of course, no doubt that the defendant would have this right of action. We submit that the amount was not known, nor, indeed, capable of being known, at the time of the execution of the agreement, for the reason that under this agreement the plaintiff could have evaded all liability to the defendant. If, as above stated, this could be done *under any conditions*, it

would mean simply that under those conditions the requirements of the defendant would be *nil*. If this is true, how can it be said, whether by direct allegation or by argumentative averment, as in the case at bar, that the needs of the plaintiff were known at the time the contract was entered into. It is not at all difficult to illustrate. Suppose a day, or a week, or a month after the execution of this so-called contract, and before the plaintiff had obligated itself to resell any sugar for August delivery, the price had dropped or the demand for sugar had abated. This is not an unreasonable supposition. The case at bar serves as a striking illustration of the effect of international affairs upon prices. The court judicially knows that the European war commenced early in August, 1914. The complaint in this case shows that the price named in this contract, to-wit, \$4.20 per bag, advanced to \$7.30 per bag, an advance of almost one hundred per cent. An increased demand necessarily results in an increased price. On the other hand, an abatement or falling off in the demand, for a stronger reason, results in a lowering of the price. On June 13, 1914, the parties hereto no more expected the increased demand and inflation of price which actually came to pass within sixty days, than they expected a complete abatement of demand. Under conditions of the latter sort, the plaintiff might very well, and in good faith, not have needed or required any sugar, for the reason that its customers required none from it. Further, if any customers, although they may have been regular customers, should, under those conditions, have applied to the plaintiff for sugar at a market price less than

that which plaintiff therefore had to pay for the same under said agreement, the plaintiff, being under no contractual obligation to make such a sale at a loss, would not have done so. As very aptly said by the court below:

“To presume otherwise would be to disregard the most obvious motives of self-interest.”

The reverse of this situation likewise may be relied upon to prove the same point. What was to prevent the plaintiff, during the month of August, 1914, from accepting orders for many times the volume of sugar formerly normally required by it in any one month. If it could do so, its August requirements can not be said to have been ascertainable or known in June, 1914. It is stated at page 30 of plaintiff's brief, referring to this particular matter, that

“It did not occur to Jenkins & Company to attempt any such imposition, and we may add that it did not occur to counsel for Jenkins & Company that any such imposition could be practiced on any American tribunal, Judge Bledsoe's fears notwithstanding.”

There is no allegation in the complaint to this effect. The statement is, therefore, *de hors* the record. Further than that, it is testimony gratuitously given by counsel. As such it has no place in a brief. A similar offense is shown at page 22 of plaintiff's brief wherein the concluding portion of the aforementioned agreement is partially copied. The testimony there given by counsel is to the effect that the C. H. & Western Sugar Refining Company were the defendant's principal competi-

tors. This also is an inexcusable departure from the record. While ordinarily such a practice can be actuated but by one method, we hesitate to believe that the distinguished counsel for plaintiff intended thereby to attract the attention of the court to matters not properly in this record. If we were to pass the matter without comment it might possibly be inferred by the court either that we admit these assertions, or that we consider them of no importance. But we do emphatically challenge the statements, which could not have been made by counsel having knowledge of the facts. We presume, however, that the violation by counsel of the rule that matters *de hors* the record cannot be considered would not justify us in ourselves transgressing such rule by stating here the actual facts of the situation as they existed at the time, much as we would like to do so under the circumstances. We must content ourselves, therefore, with the understanding that the court will consider only such matters as are properly within the record.

Resuming our discussion of the question as to whether the contract is one under which the quantity of plaintiff's August requirements can possibly be said to have been capable of reasonably accurate ascertainment, we fail to find anything either in the contract or the complaint from which the court can determine that there was any meeting of minds at the time the contract was made, either as to any definite quantity or any method whereby the quantity could be even approximately determined.

The plaintiff will doubtless reply by quoting copiously

from its second amended complaint. The complaint in this particular was obviously drawn in contemplation that this precise point would be the basis of an attack against it. It is alleged that plaintiff would contract with a sugar producer for its requirements of sugar for a fixed period and thereafter would resell said sugar at a price based upon the contract price, and that these facts were known to plaintiff. So far, the defendant has not been charged with any knowledge which would influence the decision in this case. It is further alleged that for many years plaintiff's August requirements of sugar amounted to 4800 bags and that "relying upon the contract" which, of course, means "*after*" the execution thereof, plaintiff accepted orders for 4800 bags and agreed to deliver the same, and that plaintiff *therefore* "required in its said business * * * during the month of August, 1914, the said 4800 bags of sugar" and *that at the time said contract was entered into*, the defendant knew what plaintiff's August requirements would be.

The province of a complaint is to state the ultimate facts upon which the plaintiff's cause of action is based. A demurrer thereto admits only such of those facts as are well pleaded. Therefore, a fact which is not well pleaded is not admitted. In this case the allegation that plaintiff's August requirements were known, is not well pleaded. It is an allegation which could not possibly be proved, for the reason, as hereinbefore shown, it was, on June 13, 1914, humanly impossible to foresee the events of the succeeding sixty days and not only know what would happen, but the effect

thereof upon the demand for sugar. It necessarily results from the limitations which an all-wise providence has placed upon human capabilities, that it can not be true that the plaintiff and defendant, or either of them, in June, 1913, knew how much sugar the plaintiff would require to supply the demands of its customers in August, 1914.

It will be further observed that there is not in the complaint a direct allegation that the plaintiff and defendant knew, at the time the contract was entered into, that the plaintiff would require and need during August, 1914, 4800 sacks of sugar, and no more and no less. The allegation simply is that the plaintiff, during previous months of August, had required that amount, and that *after the contract was signed, the plaintiff went out and solicited and accepted orders for that amount FOR AUGUST DELIVERY*. The conclusion is then alleged by the plaintiff that *therefore* plaintiff's August requirements were 4800 bags. The allegations concerning defendant's knowledge is not that the defendant knew that plaintiff's August requirements would be 4800 sacks and no more and no less, or approximately that amount, but that at the time said contract was entered into the defendant knew the nature and character of plaintiff's business and the manner in which it was conducted and "what plaintiff's requirements for sugar would be" during August, 1914. This is far from having the effect of rendering certain and definite the stipulation in the contract concerning the quantity. At the time the contract was entered into the quantity of sugar the plaintiff would require during August was not humanly capable of as-

certainment. The fact that the plaintiff, during previous months of August, or at any other time, required a specified quantity is immaterial as relating to a business of resale which depends entirely upon the condition of the market and not upon production. The fact that plaintiff, *after* the execution of the contract, actually accepted orders for a specified amount can have no possible bearing. Sight must not be lost of the fact that we must examine this matter as it stood on June 13, 1914, and not be influenced by what happened thereafter. The fact that it so happened that plaintiff did require 4800 sacks during August, 1914, is no argument that it would not have required more or less if conditions had been different, and, of course, when the contract was entered into, no powers of prognostication can be said to have been possessed by the parties to this transaction.

We submit that no reason can be advanced for the courts to commit themselves to a belief in the supernatural nor to accept as true allegations which human experience has taught can not be true. Suppose a complaint should be presented for consideration which alleges that white is black or black white, or that the law of gravity had become inoperative, would those allegations be accepted as true upon demurrer? We think not. The allegation, therefore, that the defendant in this case, on June 13, 1914, knew what the plaintiff would require in the way of sugar for resale in August, 1914, can not be true, as it necessitates a belief on the part of the court that the defendant at that time possessed supernatural powers. Therefore, this allegation must be disregarded and the case treated as

it should be treated, namely, that the plaintiff's August requirements would depend upon circumstances. Consequently, the contract is, insofar as the quantity involved therein is concerned, too vague and indefinite to be enforceable.

Was Contract Mutually Binding?

As above stated, if this amount was mutually known, there could have been only one reason why it was not stated in the contract and that reason is that the plaintiff did not desire to be bound to take that amount of sugar. Plaintiff cannot argue in this case that the exact quantity was not inserted in the contract in order to permit a reasonable elasticity in the amount of sugar which plaintiff might be able to demand thereunder. The allegation in this case is that the amount of plaintiff's August requirements was known *at the time the contract was entered into*. This means the *exact* amount. If the exact amount was known, as alleged, there would be no reason for any such elasticity as plaintiff's orders necessarily would be for the precise amount of its requirements. Therefore, there can be no other reason for the failure to stipulate the exact quantity, if such amount were actually known, as alleged, than that the plaintiff did not desire to bind itself to purchase any known or specified amount. There can be no better evidence than this, that the contract is lacking in mutuality. It is, however, not necessary to rest our case upon this argument alone. We desire to reiterate in this connection that the plaintiff's August requirements could not have been known in June, and proceeding upon that basis, we

find a contract which requires the defendant to sell to the plaintiff at a stipulated price, all sugar which the plaintiff might require in August, plaintiff's requirements being for resale. As has already been shown, the plaintiff's contract with the producer, according to its custom of doing business, always precedes its contracts with its customers. Hence, *at the time the contract involved in this case was signed, the plaintiff was under no obligations to deliver any sugar in August.* There is no showing in the complaint as to *when* it became so obligated, except that it does appear therefrom that these obligations were assumed *after* the execution of the contract between plaintiff and defendant. If, as hereinbefore stated, the demand for sugar had meanwhile diminished or abated, plaintiff's customers might not have required any sugar whatsoever during August. The period of time is very short and it is not unreasonable to assume that conditions might have become so acute that rather than buy sugar upon a falling market, plaintiff's customers would have bided their time for the purpose of determining what might happen. Plaintiff's customers were purchasers of sugar "at wholesale" "in bag lots." *They were not consumers.* It is, therefore, entirely possible that conditions might have arisen which would have rendered it impossible for plaintiff to have sold any sugar even had it so desired. In this connection it may be stated that the concluding paragraph of the contract does not change the situation for the reason that it only protects the plaintiff against decline to the price charged by the C. H. & Western Sugar Refining Company. This protective guarantee does not in any wise guarantee that

there will be a demand for sugar. In the absence of any demand, the plaintiff would make no sales and, therefore, would not be required to make any purchases from the defendant. A demand so weak that plaintiff's sales would be of little consequence would not change the situation. Its liability in that case, assuming its existence, notwithstanding other conclusions, would be so limited as to be entitled to little, if any, weight in considering this question.

Application of Authorities.

The precise question involved in this case has been heretofore decided. One of the leading cases upon the subject is the case of

Crane v. Crane, 105 Fed. 869,

which was a case decided in 1901 by the United States Circuit Court of Appeals of the Seventh Circuit. In that case damages were claimed for the breach of a contract by the seller whereunder he had agreed to furnish to the buyer all of the dock oak lumber which the buyer would require for his trade in the Chicago market during a fixed period at certain stipulated prices. The court in that case recognized and very clearly delineated the distinction which exists between a contract for articles intended for *consumption* and a contract covering articles intended for *resale*. As to the former the court, per Judge Grosscup, states:

“It is within legal competency for one to bind himself to furnish another with such supplies as may be needed during some certain period for some certain business or manufacture; or with such commodities as the purchaser has already

bound himself to furnish another. Reasonable provision in business requires that such contracts, though more or less indefinite, should be upheld. Thus a foundry may purchase all the coal needed for the season; or a furnace company its requirements in the way of iron; or a hotel its necessary supply of ice. *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Railway Co. v. Witham*, L. R. 9 C. P. 16; *Smith v. Morse*, 20 La. Ann. 220. So, too, a dealer in coal in any given locality may contract for such coal as he may need to fulfil his existing contracts, regardless of whether delivery by him to his customers is to be immediate or in the future. *Shipman v. Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1051. In all these cases, contracts looking towards the future, and embodying subject-matter necessarily indefinite in quantity, have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are, within certain limits, ascertainable by the vendor. He is thus enabled to make reasonably accurate calculation of the extent of his obligation. Then, too, the purchase is only an incident of the vendee's business. Presumably the business will go on irrespective of a rise or fall in the prices of subsidiary supplies. There thus remains to the vendee little or no temptation, on account of the rise or fall in prices, to greatly enlarge or diminish the quantity of his orders."

Drawing its distinction between the two classes of contracts still further and contrasting one with the other, the court says further, at page 872 of its opinion:

“The contracts brought to our attention have no such standard of approximate certainty, and no such safeguard against opportunity to impose upon the vendor. Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error and such customers as usually come to a merchant. Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also the quantum of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued.

“On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—in a situa-

tion to either go on, or to discontinue, as such interest develops.”

See also:

American Cotton Oil Co. v. Kirk (C. C. A.),
68 Fed. 791;

Tarbox v. Gotcian, 20 Minn. 139;

McIntyre etc. Co. v. Jackson Lbr. Co. (Ala.),
51 So. 767;

Hugens v. Southwest etc. Co. (Ga.), 48 S. E.
933;

Higbee v. Rust (Ill.), 103 Am. St. Rep. 204;

Walker etc. Co. v. Swift & Co., 200 Fed. 529,
43 L. R. A. (N. S.) 730;

Krause v. Greenfield (Ore.), 123 Pac. 392;

Plumb v. Hallaver, 130 Ny. Suppl. 147, 145
App. Div. 20.

The case of

Cold Blast etc. Co. v. Kansas City etc. Co., 114
Fed. 77,

decided by the Circuit Court of Appeals of the Eighth Circuit in 1902, is likewise of value as authority in this case.

This case is relied upon by counsel for plaintiff in error; but it will be found upon examination to support the principles of law relied upon by the defendant rather than those urged by the plaintiff. That court decides that “if the quantity is ascertainable otherwise with reasonable certainty,” such a contract may be sustained. Its statement is:

“An accepted offer to furnish or deliver such articles of personal property as shall be needed,

required, or consumed *by the established business* of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer.” (Italics ours.)

The court, unfortunately, does not throw any light upon what an “established business” should be held to be. The question naturally is not whether the owner’s business should have been in operation for a longer period of time than that of another, nor because, forsooth, his business has greater volume than that of another. The only reason for the injection of this element is that the line of demarkation may be drawn between valid and invalid contracts. This is evident from the court’s statement on page 80 of its intention:

“The line of demarkation between valid and invalid contracts here runs between the requirements of machinery, or of an established business, and the wants, desires, or requirements of the tentative vendee; and that because the former are either reasonably certain, or may be made so by the evidence, while the latter are conditioned by the will of the tentative vendee alone, and are both uncertain and capable of infinite variation.”

A rather skillful attempt was made in behalf of the plaintiff in the case at bar to bring itself within the letter of this doctrine, in that an especial allegation is to be found in the complaint that the plaintiff has for many years been engaged in the wholesale grocery

business and that at the time of the execution of the agreement involved herein, it had many thousands of customers and that much of its business consisted of the dealing in and selling at wholesale of sugar in bag lots, and so on.

As stated elsewhere in this brief, plaintiff has confused the shadow with the substance, relying upon a word here or a phrase there used by this court or that in dealing with this subject, in an effort to make the law fit its case. It is reckoning, however, without the spirit of the law. The sole and only reason for the mention of an *established business* in any of the decisions is to require a showing to be made, precedent to the upholding of any contract of this type, that the quantity of the requirements of the purchaser were capable of reasonably accurate ascertainment at the time of the execution of the contract. If that is true, we submit that it makes no difference whether the business were established for only two hours and of no appreciable volume. The requirements of a factory just commencing its business but having unfilled orders to a certain and definite amount for coal for the operation of that factory for a specified period could be said to be capable of reasonably accurate ascertainment, notwithstanding not one single wheel in all of its machinery had ever been turned for the manufacture of its products. On the other hand, a merchandise broker, though he may have been in business for over fifty years, and famed and known throughout the length and breadth of the land, cannot be said to have an established business within the meaning of this doctrine for the simple and obvious reason that as his

requirements of a given article are exclusively for resale, and as his ability to resell the same depends exclusively upon the demand therefor, he cannot know what quantity he will be able to resell, and therefore require during a fixed future period. This, as has been elsewhere pointed out in this brief, is the case presented by this appeal.

Granting, for the purposes of this argument, that the plaintiff's business is of great volume and wide fame and that it has been long established, it, nevertheless, is not of that *nature* which enables its owners to look into the future and determine with reasonable or any accuracy what quantity of any specified article will be required. Requirement in this case means *requirement for resale*.

This principle is everywhere recognized. Counsel has quoted an excerpt from the 6th volume of R. C. L., the quotation being taken from paragraph 61 of the topic of Contracts at page 647, which paragraph commences as follows:

“Whether a contract under which the amount or quantity is not stated specifically is enforceable seems to depend on whether such amount is ascertainable. When it is impossible to ascertain the amount or quantity the contract cannot be enforced. * * *”

In this same work, at page 689, it is stated:

“Some times it is difficult to determine whether under the terms of a particular contract both parties are bound, whether the doctrine of mutuality is applicable to such a case depends on the interpretation of the contract. Contracts to

furnish such material as one may need in his business for a specified time are, by the weight of authority, held mutual and binding upon the parties, where the *nature* of the purchaser's business is such as to make the quantity of the article he will need subject to a *reasonably accurate estimate*." (Italics ours.)

As this work has already received due praise from counsel for plaintiff in error, these quotations will be submitted without further comment.

This work, as well as a note in volume "11" of L. R. A. (N. S.), at page 713, were rather prominently relied upon by counsel for plaintiff, as showing the modern tendency of the law. If modernity is all that is desired, we might call attention to a later note to be found in volume 43 L. R. A. (N. S.), at page 730, which refers to the note above mentioned in volume 11, and states:

"As shown in the note referred to, the contracts to furnish such material as one may need in his business for a specified time are, by the weight of authority, held mutual and binding upon the parties, where the *nature* of the purchaser's business is such as to make the quantity of the article he will need subject to a reasonably accurate estimate." (Italics ours.)

Distinguishment of Cases

Plaintiff in error has cited a great many cases in its brief. Every one of these cases is readily distinguishable from the case at bar. For the most part, they are cases which involve a contract for requirements

in a business whose nature is such as to make the quantity of the needed article subject to a reasonably accurate estimate. For instance, in the case of

Lima Locomotive etc. Co. v. National Steel
Casting Co., 155 Fed. 77, 11 L. R. S. (N. S.)
713,

the purchaser was a manufacturer and the articles purchased were steel castings needed in the conduct of the business of the purchaser, to-wit, that of manufacturing locomotives and machinery.

In the case of Marx v. American Malting Co., 169 Fed. 582, the purchaser was a brewing company and the article purchased was malt needed for the manufacture of the brewing company's product.

In the case of

Manhattan Oil Co. v. Richardson, 113 Fed. 923,
the purchaser was a manufacturer of lubricating grease and compounded oils and the articles purchased were parafine and asphalt oils needed by the purchaser in the manufacture of its products.

In all of these cases, the nature of the business was such as to enable the purchaser to make a reasonably accurate estimate of its requirements.

It is not necessary to comment upon all of the cases relied upon by the plaintiff in error. The following are of import similar to those above mentioned:

Golden Cycle Mfg. Co. v. Rapson etc. Co., 188
Fed. 179;

Sterling Coal Co. v. Silver Springs, 162 Fed.
848;

Klipstein v. Allen, 123 Fed. 992;

Loudenback Fertilizer Co. v. Rennessee Phosphate Co., 121 Fed. 298;

Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142.

The case of Ramey Lumber Co. v. Shroeder Lumber Co., C. C. A. 7th Circuit, 237 Fed. 39, is clearly distinguishable from the case at bar. In that case it appeared that the seller agreed to sell to the buyer all of the lumber of certain grades which the seller should manufacture or own during the season, and that prior to the time the contract was entered into the seller had notified the buyer of approximately the amount of lumber which it would manufacture and the amount which it would otherwise acquire. The buyer refused to accept certain shipments and the suit was for the recovery of the difference between the contract price of the particular shipments and the amount which the seller actually received therefor. The case is distinguishable for another and further reason. The seller agreed to sell and the buyer agreed to receive and pay for the specified lumber. The seller, under the contract, expressly deprived itself of the right to sell to anyone other than to the buyer. Any and all lumber of the particular type which the seller might manufacture or own during the entire season was required by the contract to be sold and shipped to the buyer. This deprivation of its right to sell to whomever it pleased was considered by the court to be a sufficient consideration for the purchaser's agreement to receive and pay for such lumber. Whatever might be said concerning this case, the fact remains that at the time

the contract was executed the seller owned a large supply of lumber and was in process of manufacturing an additional supply thereof, and had valid contracts for the acquirement of still further supplies thereof. Of this, the buyer was aware. As to this amount, the contract was undoubtedly binding as it was capable of accurate ascertainment. The amount shipped was very considerably less than this. Hence the conclusion reached by the court was undoubtedly correct, although its reasoning may be subject to some criticism if it was intended to hold that a promise to sell and deliver an indefinite and uncertain supply of lumber or other personal property was a valuable consideration for and would support and render valid a contract to accept and receive the same when the amount thereof was not reasonably susceptible of accurate ascertainment. We do not believe that the statement of the court "Inasmuch as it gives a valuable consideration for this right," found on page 44 of the volume aforementioned, was intended to refer solely to this promise. We prefer to believe that the court's reasoning was that the right to buy heavily or lightly, as the market permitted, and to require the buyer to accept the same, was in nature similar to the right which an option holder acquires. The courts have held that any consideration, however small, will support such a contract. A consideration of one dollar was recited in the contract in the case aforementioned. The consideration therefor mentioned by the court could very well be the consideration last above mentioned.

The case of Minnesota Lumber Company v. Whitebreast Coal Company, 160 Ill. 85, is clearly distinguishable. The contract therein involved provided for the purchase and sale of the requirements of coal of the Minnesota Lumber Company "engaged in the purchase, use and sale of coal." As stated by the court below in its opinion in the case at bar:

"Aside from the fact that the purchaser in that case not only expected to sell coal, but to use it as well, the point considered herein and determined adversely to plaintiff's contention in Crane v. Crane, *supra*, was not made or considered therein. In addition, the conclusion of the court with respect to this branch of the case is based entirely upon the cases of National Furnace Co. v. Keystone Manufacturing Co., 110 Ill. 427, and Smith v. Morse, 20 La. Ann. 220, both of which had to do with circumstances similar to those in the cases cited by plaintiff, and in which the requirements were for an established business other than that of the sale of the precise commodity in question. The same situation existed in Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227. The only authority therein cited in support of the conclusion reached was the National Furnace Company case, which was not applicable under the circumstances shown. The conclusion in the Circuit Court of Appeals of the Seventh Circuit in the Crane case, hereinabove referred to, finds support in my judgment, in A. Santaella Co. v. Otto F. Lange & Co., 155 Fed. 719, 84 C. C. A. 145; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, and Higbee v.

Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204.”

The case of Bartlett Springs Company v. Standard Box Co., 16 Cal. App. 671, was apparently a case between the box manufacturer as seller, and some springs company as purchaser, and involved a contract for boxes to be consumed rather than resold. Under those conditions, of course, this case would be readily distinguishable on the ground that the requirements of the consumer were capable of reasonably accurate estimate.

In the case of Myer Dental Mfg. Co. v. Smith, 237 Fed. 563, it appeared that the contract provided for the sale and purchase of at least \$10,000.00 worth of appliances for the first year and an increased amount each year thereafter during the term of said contract. The seller cancelled the contract on account of the failure of the purchaser to meet the minimum. The buyer brought suit to enjoin the seller from enforcing the cancellation. The seller alleged that the contract was void for want of mutuality and also that it was subject to cancellation on account of the nonperformance of the buyer's obligations. The court held this latter to be true and only dealt with the former question in the following language:

“Defendant contends, first, that the contract of May 7, 1913, is unilateral, and for that reason unenforceable in law or equity. This contention, in our opinion, is untenable. The covenants of the contract conferring rights and imposing obligations upon the respective parties afforded ample

consideration for each other, and clearly validated the contract so far as this contention is concerned."

The net effect of this decision may be said to be that the obligation of the buyer to purchase and pay for a definite minimum is not only sufficient consideration for the obligation of the buyer to sell that minimum, but is also a sufficient consideration for the agreement of the seller to supply such additional excess as the buyer might order.

It may be seen that, as the result reached by the court in that case was the same as it would have been if it had decided this point otherwise, the court did not give this point very deep consideration. Therefore, this case is of no great value as authority upon this point.

The case of Connley Camera Company v. Multi-scope Film Company, 216 Fed. 892, is similar to the case last above mentioned in that the contract was supported by the additional consideration that the purchaser in the same contract, and as a part of the consideration thereof, sold certain patents to the seller and the seller of the cameras gave to said purchaser an option at a fixed price to buy cameras. The comment made upon the previous case is applicable to this. In none of these cases was there raised the question raised in this case. At least, the courts in their opinions do not discuss the precise question. The only thing apparently considered as of importance is whether there was a consideration for the contract.

In addition to these cases, counsel for plaintiff in error have cited in their briefs the cases of *Grand Prairie Gravel Co. v. Wills Co.* (Tex.), 118 S. W. 680, and *Western Maccaroni Co. v. Fiore* (Utah), 151 Pac. 984. These cases are of similar import to those aforementioned. The court considers the question of consideration and holds the contracts to be valid.

We most earnestly and deferentially submit that there is neither sufficiency nor value in a promise to buy goods which may vary in quantity from nothing to a tremendous volume.

While it is true that the contract reads that the plaintiff "buys August requirements bags fine granulated beet sugar," etc., the court will observe that it is entirely silent as to any definition of the term "August requirements" and contains nothing whatsoever to indicate any method by which its meaning could be made sufficiently definite and certain in any action which the defendant might bring to enforce its rights or recover damages in case of an alleged breach by plaintiff. If the promise to buy is not sufficiently definite and certain to support a cause of action for damages for breach thereof it has no validity and cannot be said to have any value whatever to furnish the consideration for a corresponding promise on the part of defendant. Each contract of this character must, of course, be considered according to its own language, as well as the surrounding circumstances under which it is made. We are not aided by any appropriate allegations in the complaint to indicate what was meant by the parties in using the term "August requirements." In the case

of a consumer having an established business within the meaning of the cases there would be less difficulty in ascertaining the meaning of the term if it could be shown that a fixed quantity of the commodity would be used during a particular period in the regular course of business. The quantity *consumed or required for consumption* would be the measure. But what does the term mean in the business of a broker or dealer? Standing as it does in this record it is indeed vague, uncertain, indefinite and unintelligible. There are so many perplexing variations of meaning possible that if the situations were reversed and this defendant were suing for damages for a breach by plaintiff it would be impossible to frame a complaint which would not afford the purchaser an opportunity of escape under one or the other of the various possible meanings. For instance:

It might mean the amount of sugar which the plaintiff would *order* during August, whether for delivery during that month or thereafter, or whether to fill orders taken prior to August or during August.

It might mean the amount of sugar which plaintiff would require during August to maintain its reserve stock.

It might be limited to the amount of sugar which plaintiff would be required to deliver to its customers during August in filling orders taken prior thereto.

Or it might be limited to the quantity of sugar required to be delivered during August in filling orders taken during that month.

It might mean the amount of sugar which plaintiff

would find it necessary to purchase during August to fill orders taken that month and deliverable later.

These are not idle speculations, but go to the very vitals of the case, because if a promise to buy is not sufficiently definite and certain to support a cause of action for its breach it is of absolutely no value to the party relying thereon.

There was nothing in the situation to obligate the plaintiff either to buy or sell any sugar during the month of August. If the market were against plaintiff it could readily have declined to sell any of its customers this particular commodity; it could have purchased during July such quantity of sugar as that none would be required during August. It could have postponed the purchase until after the month of August all sugar which otherwise might be purchased during that month for future delivery; or it could have evaded any obligation because of the vagueness of the contract on any one of numerous other theories. It is inconceivable that plaintiff would require any sugar during August if to do so meant the solicitation or acceptance of orders for the sale thereof during that month with a loss on each bag sold. It did not obligate itself to purchase the same quantity which it may have purchased during the preceding August or during any other month. There was nothing in the contract to prevent plaintiff from laying in a stock in July sufficient to enable it to fill orders for the balance of the year or any other length of time. It did not obligate itself to purchase during August what its customers would require it to deliver during that month. It did not

agree to purchase during August the quantity which might be required to fill orders taken during July. It did not agree to purchase from defendant during August what its customers might require for delivery during that month. The contract relates only to plaintiff's own requirements. The defendant would be utterly unable under such contract to sustain an allegation that the purchaser "required" any sugar whatsoever if plaintiff should choose not to require it. Plaintiff's promise meant nothing more than that it would buy sugar from the defendant if it chose to do so.

In their argument plaintiff's counsel lay great stress upon the fact that plaintiff agreed to purchase its sugar during the month of August, 1914, exclusively from the defendant. We submit that this contention is not supported by the record. There is no express agreement to that effect. And there can be no implied agreement under the circumstances, for the contract is equally as vague and uncertain for the purpose of supporting an implied agreement as for any other purpose.

It is true that there is an allegation to the effect that the defendant named a lower price in consideration of the plaintiff's agreeing to buy exclusively from the defendant. If this is the allegation relied upon, it is not definite or certain enough to be considered. It is not an allegation that the plaintiff did in fact so agree. The written contract does not show that it did, and there is no allegation in the complaint that any other contract or agreement was entered into. The allegation, therefore, cannot be accepted as anything but a

conclusion of law from the contract declared upon. There is in fact nothing in the complaint to show that the plaintiff agreed to anything. It simply bought its August requirements. It did not even agree that there would be any requirements.

Point No. 3.

The Complaint Is Void, Uncertain, Ambiguous and Unintelligible.

We have already indicated the number of the points of indefiniteness and uncertainty which render the complaint demurrable. We do not believe any extended discussion is necessary under this head. We will simply set forth these points with very little, if any, comment.

(1) The complaint sets up a contract which provides that plaintiff buys and defendant sells "August requirements" of sugar. There is no allegation to help out the contract or to aid the court in determining that any facts existed upon which to predicate a finding that the "August requirements" were capable of definite ascertainment. We have already indicated in a preceding paragraph the particulars in which the contract is obnoxious in this respect and the necessity for some showing greater than has been made to enable the court to say that plaintiff was under any obligation whatsoever to buy.

Each one of the various contingencies suggested is vitally different from each of the others and involves an entirely different theory upon which to determine quantity. The quantity which defendant was obligated to sell is necessarily the most important feature of the

contract. The flexibility of the term, therefore, demands that the contract be supported by such allegations as would enable the court to determine what the contracting parties had in mind when the contract was made as the *measure* of the August requirements. Apparently the plaintiff did not consider that feature of the contract as of sufficient importance at the time it was made to necessitate the insertion therein of a definite amount. If there were other elements in the situation from which the court could interpret the meaning of the term, appropriate allegations in the complaint are necessary to supply the deficiencies in the contract and to enable the defendant to meet by answer such theory as the plaintiff might adopt.

The complaint is therefore fatally defective by reason of the absence of such allegations and the uncertainty of the entire complaint in that respect.

(2) It is alleged in the complaint that the price fixed in this contract was lower than the market price, and that this price was agreed to by the defendant in consideration of the plaintiff agreeing to buy exclusively from the defendant. This has already been discussed under a previous heading and nothing is necessary to be added to what was there said. The complaint is, therefore, uncertain, ambiguous and unintelligible in that it does not state whether this was actually agreed to between the parties separate and apart from the written contract declared upon. In the absence of such a showing, it can only be considered as a conclusion of the pleader that the written contract has that legal effect.

(3) It does not appear from the complaint when the plaintiff bought in open market. Paragraph XI of the complaint attempts to show wherein the plaintiff was damaged. The paragraph should be referred to at this point and for that reason we are copying the same:

“That by reason of the refusal of the defendant to deliver said four thousand two hundred (4200) bags of sugar and by reason of the non-delivery thereof, the plaintiff lost its profits on the re-sale thereof, and was compelled to and did buy in the open market, at the prevailing market price, fine granulated beet sugar at a price in excess of said contract price, amounting to three and 10/100 dollars (\$3.10) per bag, and that it did purchase in the open market at said advanced price four thousand two hundred (4200) bags of said sugar for delivery to its said customers.”

It will be noted that the allegation simply is that plaintiff bought in open market. We believe that it is necessary for the complaint to be more certain in this respect. The plaintiff could prove under this allegation that its said purchases were made in September, October or November. The complaint was not filed until December, 1914.

(4) It does not appear whether the said purchases so made by the plaintiff were for August delivery. If the purchases were made to fulfill the September requirements of the plaintiff, the same have no bearing upon the case at bar which relates exclusively to August requirements.

(5) There is no showing that the said purchases so made by the plaintiff, or any thereof, were ever actually delivered by the plaintiff. The allegation simply is that the purchases were made and delivered to the purchaser's customers. It is just as uncertain in this respect as the words "August requirements" are uncertain. The business of the plaintiff is that of a seller. It cannot charge the defendant with the alleged difference in price for sugar which it did not sell and deliver, but which it retained unsold in its warehouse.

(6) There is no allegation to show that the purchases so made by the plaintiff were in fact made for the purpose of filling orders received from its customers during the month of August, and that the same was actually delivered to those customers in satisfaction of those orders.

(7) There is nothing in the complaint to show when the plaintiff accepted and received orders from its customers based upon the contract price of sugar specified in the contract declared upon. This should be rendered more definite and certain. Under the complaint, as it is now, it can be assumed that these orders were not taken until the price of sugar had advanced. Under the rule that a pleading is to be construed against, rather than favorably to, the pleader, this assumption must be seriously taken. If this is true, there could be no better evidence of the want of good faith on the part of the plaintiff and, therefore, of the absence of any intention on its part to be bound under the contract.

Conclusion.

The foregoing are only a few of the particulars wherein the complaint is uncertain, ambiguous or unintelligible. All of these particulars were specified in the demurrer to the plaintiff's second amended complaint. The plaintiff, therefore, had ample notice of what was regarded by the defendant as being uncertain, ambiguous or unintelligible. The demurrer was sustained by the court. In its order sustaining the same, it expressly granted to the plaintiff leave to again amend its complaint. The plaintiff elected not to do this and served notice of this election. The plaintiff, therefore, had ample opportunity to correct these defects. It did not deign to do so. The complaint in these respects has not been corrected. In considering the matter presented on this appeal, the court must, before holding the complaint sufficient, pass upon all of the grounds of the demurrer. In view of plaintiff's refusal to amend, it must, we submit, be inferred and assumed that plaintiff was unable to cure these deficiencies and that the complaint states all facts which the plaintiff was able to state. We submit that the demurrer was properly sustained and that, therefore, the judgment of the lower court should be affirmed.

Respectfully submitted,

DONALD BARKER,

Attorney for Defendant in Error.

No. 3015

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellee,

vs.

CHARLES K. HOLSMAN *et al.*,

Appellants.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

Filed

JUN 20 1917

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Defendant and Appellant Charles K. Holsman:

DUKE STONE, Esq., 434-436-438 Merchants
Nat'l Bank Building, Los Angeles, California.

For Defendant and Appellant Gideon M. Freeman:

M. E. MEADER, Esq., 532 Higgins Building,
Los Angeles, California.

For Plaintiff and Appellee:

ALBERT SCHOONOVER, Esq., United States
Attorney; W. F. PALMER, Esq., Assistant
United States Attorney, fourth floor Federal
Building.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

Citation (on Writ of Error).

United States of America—ss.

To the United States of America, and to the United
States District Attorney for the Southern District
of California, Southern Division, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the state of California, on the 9th day of Feb., A. D. 1917, pursuant to a writ of error, filed in the clerk's office of the United States District Court of the Southern District of California, Southern Division, in the certain action No. 903 criminal, wherein Charles K. Holsman and Gideon M. Freeman are plaintiffs in error, and you are the defendant in error, to show cause, if any there be, why the judgment and sentence given, made and rendered against the said plaintiffs in error, as in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Oscar A. Trippet, United States district judge for the Southern District of California, Southern Division, this 10th day of January,

1917, and of the Independence of the United States the one hundred and forty-first.

OSCAR A. TRIPPET,

United States District Judge.

Receipt of a copy of the within citation is hereby admitted this 10 day of Jan., 1917.

ALBERT SCHOONOVER,

United States District Attorney for the Southern District of California.

By W. F. Palmer,

Assistant United States Attorney.

[Endorsed]: Case No. 903 Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman, et al., defendants. Citation (on writ of error). Filed Jan. 10, 1917, at 30 min. past 11 o'clock, 9 M. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for said defendant.

In the District Court of the United States, Southern District of California, Southern Division.

Case No. 903 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN, et al.,

Defendants.

Writ of Error.

United States of America—ss.

The President of the United States of America, to the
Honorable the Judges of the United States District Court, in and for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America, as plaintiff, and Charles K. Holsman and Gideon M. Freeman, as defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do hereby command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the state of California, on the 9th day of Feby., 1917, next in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, chief jus-

tice of the United States, this the 10th day of January, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-first.

WM. M. VAN DYKE,
Clerk of the United States District Court, in and for
the Southern District of California, Southern
Division.

(Seal) By Chas. N. Williams,
Deputy Clerk.

The above writ of error is hereby allowed.

OSCAR A. TRIPPET,
District Judge.

I hereby certify that a copy of the within writ of error was on the 10th day of January, 1917, lodged in the clerk's office of the said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk of the United States District Court, Southern
District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: Case No. 903 Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman, *et al.*, defendants. Writ of error. Filed Jan. 10, 1917, at 30 min. past 11 o'clock, 9 M. Wm. M. Van Dyke, clerk; Murray C White, deputy. Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for said defendant.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

Indictment.

At a stated term of said court, begun and holden at the city of Los Angeles, county of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and fourteen.

The grand jurors of the United States of America, chosen, selected and sworn, within and for the division and district aforesaid, on their oath present:

That Charles K. Holsman, Henry L. Giles, Gideon M. Freeman, Ambrose C. Sims and Otto C. Joslin (since deceased), whose full and true names are, and each of them is, other than as herein stated, to the grand jurors unknown, hereinafter in this indictment called defendants, on or about the 1st day of January, in the year of our Lord one thousand nine hundred and twelve, in the city of Los Angeles, county of Los Angeles, state of California, in said Southern District of California, Southern Division, did then and there unlawfully, wilfully and feloniously conspire, combine, confederate and agree together to commit an offense against the United States, that is to say, the said defendants did then and there knowingly and unlawfully conspire, combine, confederate and agree together in devising and intending to devise a scheme and artifice to defraud certain persons, to-wit, any and all persons who could be induced to send defendants money, as hereinafter stated, and it was a part of said conspiracy,

for the purpose of executing said scheme and artifice to defraud, and attempting so to do, to place and cause to be placed, letters, packages, circulars and advertisements, in the United States postoffice at Los Angeles, California, and stations thereof, and street and letter boxes of the United States and other authorized depositories for mail matter in said city of Los Angeles, to be sent and delivered by the postoffice establishment of the United States, the nature, character and contents of said letters, packages, circulars and advertisements, except as hereinafter stated in the description of said scheme and artifice to defraud, being to the grand jurors unknown, and which said scheme and artifice to defraud was in substance as follows:

Said defendants intended to place and cause to be placed, divers advertisements in certain newspapers circulating generally throughout the western and southern part of the United States by means of the postoffice establishment of the United States and otherwise and published within the United States and in said Southern Division of said Southern District of California, wherein it should and would be set forth in substance and effect that the said Gideon M. Freeman was a physician practicing in the city of Los Angeles, California, and especially and specifically qualified to treat diseases of men, that is to say, among other diseases, loss of vitality, lost manhood, and declining manly power, and could and would cure any person afflicted with such diseases; that by means of said advertisements said defendants intended to cause and induce divers persons to communicate and open correspondence with them in the name of said defendant Gideon

M. Freeman, by means of the postoffice establishment of the United States, relative to their real or supposed symptoms or ailments; that when said persons so intended to be defrauded communicated with said defendants by the means aforesaid, said defendants intended to write and communicate with said persons by means of letters to be sent through said postoffice establishment enclosing a symptom blank in each of said letters, and advising each of said persons to answer carefully all questions contained in said blank, relative to his real or supposed ailments, and to send the same and a sample of such person's urine, to said Freeman, who would make a thorough study and analysis of same and then would be able to treat such person as well as if he were in said Freeman's office; and that nothing would be left undone by said Freeman to restore said persons to full vigor and health, and, irrespective of any symptoms that might be disclosed to defendants by said blanks and samples of urine, and even where said blanks and urine disclosed a normal physical and mental condition, and without any attempt by analysis of said urine or by careful examination of said symptom blank, or otherwise, to ascertain whether or not such persons were actually suffering from such a disease or any disease whatever, or believed themselves to be suffering therefrom, defendants intended, in letters to be sent to said persons through the postoffice establishment of the United States, to state to such persons, and induce them to believe, that their condition was thoroughly understood by defendants and that such persons were right in attending to their trouble at once, as such trouble, if neglected, would steadily become worse and

gradually undermine the general health, wreck the nervous system, and result in the total loss of manhood, of such persons, and defendants intended to state to and advise such persons in such letters to commence treatment at once, and that if such persons wished to avail themselves of said Freeman's treatment and advice, to forward to the secretary of said Freeman money to pay for a month's treatment, or if the entire three months' course of treatment was desired to send the entire amount therefor, which amount defendants intended to place at considerably less than three times the amount to be fixed for one month's treatment, which latter amount defendants intended to fix at different amounts to the different individuals; the basis upon which said amounts would be fixed and the different amounts defendants intended to so fix, being to the grand jurors unknown. Said statements, representations and advice so intended to be so made and given to said persons so to be defrauded as aforesaid, were not intended by said defendants to be made in good faith for the purpose of ascertaining the physical and mental condition of said persons, so that defendants could in good faith furnish treatment to cure and alleviate such condition; but were intended to be made by defendants for the purpose of inducing said persons to believe they were seriously afflicted with a disease of the urogenital organs, regardless of whether said persons were so afflicted or not, and to induce said persons to send and pay money to said defendants in cases where no treatment at all, physical or mental, was needed, and to induce others of such persons to pay for more treatment than the actual physical and mental

condition of said other persons so to be defrauded required.

And the said defendants, within the jurisdiction aforesaid, in pursuance of said conspiracy, and to effect the object thereof, did, on the 12th day of October, 1912, place and cause to be placed in the postoffice in said city of Los Angeles, or in a station, street box or letter box thereof, to be sent and delivered by the post-office establishment of the United States, a certain letter directed "Mr. Clyde L. Coon, Kingman, Arizona, Box #741," a copy of said letter being as follows, to-wit:

"All communications strictly confidential.

Consultation and advice free in person or by mail.

Daily office hours: 9 a. m. to 8 p. m. Sundays:
10 to 1.

G. M. Freeman, M. D.

The Leading Specialist for Men.

327½ South Spring Street.

Largest and best equipped office in the west.

Confidential letters, money orders, drafts, etc., will reach us safely addressed to my secretary, A. C. Sims, 327½ S. Spring street, Los Angeles, Cal.

I confine my practice to the special, private, chronic and genito-urinary diseases of men.

Los Angeles, Cal., October 12, 1912.

Mr. Clyde L. Coon,

Box #741, Kingman, Arizona.

My Dear Sir:—

Your symptom blank is now before me and your remarks and symptoms have been carefully considered. I have subjected the sample of urine to a thorough

analytic test and have come to the conclusion that I thoroughly understand your condition and have no experiments to make. You are right in attending to this trouble at once, for if neglected, it would surely undermine your nervous system and result in a total loss of manhood.

The loss of the vital fluid during sleep and in the urine is a serious drain on one's system and you will readily understand the importance of having this drain stopped as soon as possible.

Should you wish to avail yourself of my treatment and advice, you will please forward me the cost of same, which will be \$35, payable \$15 cash, \$10 in thirty days and \$10 in sixty days, or if you desire to pay all cash, I will accept \$30 in full payment for the three months' treatment.

I have treated and cured thousands of men afflicted as you are, and I am sure should you place your case with me and take my treatment, following my instructions, you will never regret the small outlay, but on the other hand you will be more than grateful that you have taken my treatment and followed my advice, for I will certainly restore you to perfect virility and keen vigor in a very short while. You will improve soon after you have placed your case under my treatment and it will not interfere with your work whatsoever. You will become filled with magnetism and will improve not only physically but mentally as well, for there is a very close connection between the nerves of the sexual organs and those of the brain.

Trusting that you will write me by return mail letting me know what disposition to make of your corre-

spondence, and assuring you of my very best attention should you place your case in my hands, and guaranteeing you that the benefits you will derive from my treatment will be worth to you many times the amount you pay, I am,

Very faithfully yours,

G. M. FREEMAN, M. D."

And the grand jurors aforesaid, on their oaths aforesaid, do further present that said defendants, in further pursuance of said conspiracy and to further effect the object thereof, did, on the 30th day of August, 1912, place and cause to be placed in the postoffice in the said city of Los Angeles, or in a station, street box or letter box thereof, to be sent and delivered by the postoffice establishment of the United States, a certain letter, directed, "Cicero Hickman, Deming, New Mexico, Box 382," a copy of said letter being as follows, to-wit:

"All communications strictly confidential.

Consultation and advice free in person or by mail.

Daily office hours: 9 a. m. to 8 p. m. Sundays:
10 to 1.

G. M. Freeman, M. D.

The Leading Specialist for Men.

327½ South Spring Street.

Largest and best equipped office in the west.

Confidential letters, money orders, drafts, etc., will reach me safely addressed to my secretary, A. C. Sims, 327½ S. Spring street, Los Angeles, Cal.

I confine my practice to the special, private, chronic and genito-urinary diseases of men.

Los Angeles, Cal., Sept. 1, 1912.

Mr. Cicero Hickman,

Deming, New Mexico.

My dear Sir:—

Your symptom blank is now before me and your remarks and symptoms have been carefully considered.

Having made a specialty of trouble such as yours for the past twenty years or more, I thoroughly understand your condition and have no experiments to make. My record of curing such trouble is one of unbroken success.

I have subjected your sample of urine to a careful analytical test and have come to the conclusion that you are losing semen in your urine and during sleep, and this is a very serious drain on one's whole system. These drains are sapping the very life blood from you and weakening you not only physically but mentally as well, for there is a very close sympathetic connection between the nerves of the sexual organs and the brain. The loss of one drop of semen without venereal orgasm weakens a man as much as the loss of one ounce of blood, and when you are losing several drops of the vital fluid daily, you can readily estimate the seriousness of such a drain and see how necessary it is to have it stopped as soon as possible.

Should you wish to avail yourself of my treatment and advice, my fee will be \$35, payable \$15 cash, \$10 in thirty days and \$10 in sixty days, or if you are in position to pay a cash fee, I will accept \$30 in full payment. Upon receipt of your remittance for whichever amount you wish to send, I will prepare and forward you at once the necessary treatment for the first month.

You will improve soon after you have placed yourself under my treatment and it will not interfere with your work whatsoever.

Kindly write me a line by return mail so that I may know what disposition to make of your correspondence, as I do not wish to annoy you with needless letters. Assuring you of my very best attention should you place your case with me, and guaranteeing you that the benefits you will derive from my treatment will be worth to you many times the amount you pay, I am,

Very faithfully,

G. M. FREEMAN, M. D."

Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

ALBERT SCHOONOVER,

United States Attorney.

[Endorsed]: Form No. 456. No. 903 Crim. United States District Court, Southern District of California. The United States of America vs. Charles K. Holzman, Henry L. Giles, Gideon M. Freeman, Ambrose C. Sims and Otto C. Joslin (since deceased). Indictment for viol. Sec. 37, Act Mch. 4, 1909, Ch. 321. Conspiracy to violate Sec. 215, Act Mch. 4, 1909, Ch. 321. Using mails in scheme to defraud. A true bill. Fred W. Beau De Zart, foreman. Presented and filed in open court, this 6th day of January, A. D. 1905. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk.

*In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

No. 903 Criminal.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

GIDEON M. FREEMAN, et al.,

Defendants.

Demurrer.

Now comes the defendant, Gideon M. Freeman, and demurs to the indictment on file herein on the following grounds, to wit:

I.

That said indictment does not state facts sufficient to constitute a public offense.

II.

That said indictment is multifarious in that each of said letters set forth in said indictment constitute each a separate and distinct offense and more than one offense is charged in said indictment without being separately set forth or stated and that more than one offense is set forth in the same count without being separately stated.

III.

That said indictment is uncertain and indefinite in this, that it does not state, nor can it be ascertained therefrom, whether the statements contained in said letters, or in either of said letters, are true or false, nor whether the diagnosis set forth in said letters is true or false, nor whether the addressees of said letters

suffered as in said letters set forth, nor whether any money was received by defendants or any of them, nor in what newspapers said advertisements were set forth, nor what said advertisements contained, nor whether any symptom blank or diagnosis sheet was sent to either of the addressees of said letters, nor whether any symptom blank or diagnosis sheet was filled out or sent unto the defendant or any of the defendants, nor what the statements in said symptom blanks or diagnosis sheets were, nor what representations or statements were made by either of the addressees of said letters unto the defendant or defendants as to their ailments or supposed ailments; nor can it be ascertained therefrom upon what information the letters alleged to have been written were written and the advice therein given, nor what the letters, to which the ones set forth in the indictment are answers, contained or represented or set forth, nor whether or not the said addressees of said letters did really and in fact suffer as set forth in said letters and as advised, as alleged by defendants, nor whether said addressees of said letters set forth in the indictment did suffer any ailment or did suffer the ailments set forth in said letters.

Wherefore, the defendant asks that this demurrer be sustained and this indictment be dismissed.

GEO. S. HUFF,
FRANK C. HILL,
LYNDEN BOWRING,

Attorneys for Said Defendant Gideon M. Freeman.

[Endorsed]: No. 903. Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United

States of America, plaintiffs, vs. Gideon M. Freeman, et al., defendants. Demurrer. Received copy of the within demurrer this 25th day of January, 1915. Filed Febry. 8, 1915. Wm. M. Van Dyke, clerk; by F. F. Green, deputy. Geo. S. Hupp, attorney-at-law, 1111-1114 Van Nuys Building, 7th and Spring Sts. Home 10801, Main 5742. Los Angeles, California.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 903—Criminal.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

GIDEON M. FREEMAN, et al.,

Defendants.

Motion to Quash.

Now comes the defendant Gideon M. Freeman and moves the court to quash and set aside the indictment in the above entitled matter and assigns in support of said motion the following reasons:

I.

That said indictment does not state facts sufficient to constitute a public offense.

II.

That said indictment is multifarious in that each of said letters set forth in said indictment constitute each a separate and distinct offense and more than one offense is charged in said indictment without being separately set forth or stated and that more than one of-

fense is set forth in the same count without being separately stated.

III.

That said indictment is uncertain and indefinite in this, that it does not state, nor can it be ascertained therefrom, whether the statements contained in said letters, or in either of said letters, are true or false, nor whether the diagnosis set forth in said letters is true or false, nor whether the addressees of said letters suffered as in said letters set forth, nor whether any money was received by defendants or any of them, nor in what newspapers said advertisements were set forth. nor what said advertisements contained, nor whether any symptom blank or diagnosis sheet was sent to either of the addressees of said letters, nor whether any symptom blank or diagnosis sheet was filled out or sent unto the defendant or any of the defendants, nor what the statements in said symptom blanks or diagnosis sheets were, nor what representations or statements were made by either of the addressees of said letters unto the defendant or defendants as to their ailments or supposed ailments; nor can it be ascertained therefrom upon what information the letters alleged to have been written were written and the advice therein given, nor what the letters, to which the ones set forth in the indictment are answers, contained or represented or set forth, nor whether or not the said addressees of said letters did really and in fact suffer as set forth in said letters and as advised. as alleged by defendants, nor whether said addressees of said let-

ters set forth in the indictment did suffer any ailment or did suffer the ailments set forth in said letters.

GEO. S. HUPP,
FRANK C. HILL,
LYNDEN BOWRING,
Attys. for Deft. Freeman.

Wherefore, this defendant prays that said indictment be as to this defendant quashed and set aside.

GEO. S. HUPP,
FRANK C. HILL &
LYNDEN BOWRING,

Attorneys for Said Defendant Gideon M. Freeman.

[Endorsed]: No. 903. Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, plaintiffs, vs. Gideon M. Freeman, *et al.*, defendants. Motion to quash. Received copy of the within motion to quash this 25th day of January, 1915. Filed Febry. 8, 1915. Wm. M. Van Dyke, clerk; by F. F. Green, deputy. Geo. S. Hupp, attorney-at-law, 1111-1114 Van Nuys Building, 7th and Spring Sts. Home 10801, Main 5742. Los Angeles, California.

*In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

Demurrer.

Comes now defendant Charles K. Holsman and demur to said indictment, and for cause of demurrer alleges:

I.

That said indictment does not state facts sufficient to constitute an offense against the United States, or the laws thereof;

II.

That said indictment does not state facts sufficient to constitute an offense, in this, to wit:

1. That said indictment does not sufficiently set out a scheme to defraud;

2. That said indictment does not allege that said scheme devised by defendants was by means of false or fraudulent pretenses, representations, or promises;

3. That said indictment does not allege how said scheme was to be executed;

4. That said indictment does not allege that the persons to be defrauded had ever seen said letters, or had any knowledge of them, or were in anywise deceived thereby, or that the same were intended to deceive anyone;

5. That said indictment does not allege that said scheme set out therein was used or intended to defraud, or was illegal, or that the same was calculated to deceive a person of ordinary comprehension or prudence;

6. That said indictment does not allege that the representations as to the ability, experience, and treatment which defendants are alleged to have made, were not made in good faith, and under an honest belief in their truth;

7. That said indictment does not directly and positively set out the specific scheme or artifice which it is alleged defendants entered into or devised;

III.

That said indictment attempts to charge two separate and distinct offenses, to wit, two offenses to use the mails of the United States in a scheme to defraud, which said alleged offenses are not separately stated, but are joined in one count of said indictment; that said indictment has attempted to charge under one count and not by separate statements in two counts, a conspiracy to defraud by means of the postoffice establishment, and the actual commission of the crime of depositing in the postoffice two separate and distinct letters addressed to different persons, at different times and directed to different towns, in the execution of a scheme to defraud.

IV.

That said indictment was not found within three years next after said alleged offense was committed, and that same is barred by the statutes of the United States and cannot now be prosecuted, tried, or punished.

Wherefore, defendant Holsman prays that said indictment be dismissed and he be allowed to go hence.

CHARLES H. FAIRALL,

Attorney for Defendant Holsman.

[Endorsed]: No. 903 Crim. District Court of the United States, Southern District. United States of America, plaintiff, vs. Charles K. Holsman *et al.*, defendants. Demurrer to indictment of deft. Chas. K. Holsman. Filed Mch. 1st, 1915. Wm. M. Van Dyke,

clerk; by F. F. Green, deputy. Charles H. Fairall, attorney at law, 509 Balboa Building, San Francisco, California.

Copies of Minute Orders.

At a stated term, to wit: the January term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the first day of March, in the year of our Lord one thousand nine hundred and fifteen;

Present:

The Honorable Benjamin F. Bledsoe, district judge.

No. 903 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

This cause coming on this day to be heard on the motion of defendant Gideon M. Freeman to quash the indictment, and also coming on to be heard on the demurrer of defendant Gideon M. Freeman to the indictment, and also coming on to be heard on the demurrer (this day filed herein) of defendant Charles K. Holzman to the indictment; Albert Schoonover, Esq., U. S. attorney, appearing as counsel for the United States; defendant Holzman being present on bail, with his counsel, Chas. H. Fairall, Esq.; defendant Freeman being present on bail, with his counsel, Geo. S. Hupp,

Esq.; and said motion of defendant Freeman to quash the indictment having been argued, in support thereof, by Geo. S. Hupp, Esq., of counsel for defendant Freeman, and thereupon submitted to the court for its consideration and decision; it is by the court ordered that said motion to quash the indictment be, and the same hereby is denied; and the demurrer of defendant Freeman to the indictment having been argued, in support thereof, by Geo. S. Hupp, Esq., of counsel for defendant Freeman, and submitted to the court for its consideration and decision, it is by the court ordered that said demurrer of defendant Freeman to the indictment be, and the same hereby is overruled; and the demurrer of defendant Holsman to the indictment having been argued in support thereof by Chas. H. Fairall, Esq., of counsel for said defendant Holsman, and submitted to the court for its consideration and decision, it is ordered that the demurrer of defendant Holsman to the indictment be, and the same hereby is overruled; and defendant Charles K. Holsman having thereupon been required to plead to said indictment, and having pleaded not guilty as charged therein, which plea is now by order of the court entered herein; it is, on motion of Albert Schoonover, Esq., U. S. attorney, of counsel for the United States, ordered that the order heretofore made and entered herein fixing the bail of defendants Holsman and Freeman at \$5000.00 each be, and the same hereby is vacated and set aside, and it is further ordered on like motion, that the bail of said defendant Holsman and Freeman be, and the same hereby is fixed at \$1000.00 each, and it is further ordered, on like motion, that defendant Holsman be, and

he hereby is granted ten (10) days within which to file an additional or new bond herein; and defendant Gideon M. Freeman having been required to plead to the indictment, and having pleaded not guilty as charged therein, which plea is now by order of the court entered herein; it is ordered that, for the setting of this cause down for the trial of defendant Holsman and Freeman, said cause be placed on the April trial calendar of this court, to be called on Monday, the 5th day of April, 1915, at 10 o'clock a. m.

At a stated term, to wit: the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Tuesday, the twenty-eighth day of November, in the year of our Lord one thousand nine hundred and sixteen:

Present:

The Honorable Oscar A. Trippet, district judge.

No. 903 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

This cause coming on this day for the trial of defendants Charles K. Holsman and Gideon M. Freeman before the court and a jury to be impanelled; Clyde R. Moody, Esq., and Wm. F. Palmer, Esq., assistant U. S. attorneys, appearing as counsel for the United States: defendants Holsman and Freeman being pres-

ent on bail, with their counsel, George S. Hupp, Esq., Duke Stone, Esq., and Mack Meader, Esq.; and W. C. Wren being present as shorthand reporter of the testimony and proceedings, and acting as such; and the court having ordered that the trial proceed and that a jury be impanelled herein; and the following twelve (12) petit jurors having been duly drawn, called and sworn on *voir dire*, to wit: Joseph A. Anker, Walter W. James, William S. Barrowman, George B. Wilson, Otto J. Zahn, Henry Kettle, L. T. Bradford, James Calderwood, W. J. Doran, M. L. Rossiter, William Chislett and Hugh M. McFarland; and a statement having been made to the jurors by the court; and said twelve jurors having been examined by the court and by counsel for the government and by counsel for defendants; and W. J. Doran having been challenged and excused for cause by the court; and the remaining eleven jurors in the box having been passed for cause; and Otto J. Zahn having been challenged peremptorily by defendants and excused; and George B. Wilson having been challenged peremptorily by defendants and excused; and William Chislett having been challenged peremptorily by defendants and excused; and William S. Barrowman having been challenged peremptorily by plaintiffs and excused; and M. L. Rossiter having been challenged peremptorily by defendants and excused; and the remaining six jurors, to wit: jurors Joseph A. Anker, Walter W. James, Henry Kettle, L. T. Bradford, James Calderwood and Hugh M. McFarland, having been accepted by counsel for plaintiffs and by counsel for defendants and duly sworn as jurors to try this cause; and, in

place of the six jurors excused, the following six petit jurors having been duly drawn, called and sworn on *voir dire*, to wit: Owen E. Graham, Charles W. Corbaley, A. W. Morgan, L. C. Turner, C. A. Henderson and J. H. Byerley; and said last named six jurors having been examined by the court and by counsel for plaintiffs and by counsel for defendants; and A. W. Morgan having been challenged for cause by defendants, which challenge is resisted by plaintiffs and denied by the court, to which ruling of the court on motion of defendants and by direction of the court exceptions are hereby noted herein on behalf of defendants; and the remaining jurors having been passed for cause; and A. W. Morgan having been challenged peremptorily by defendants and excused; and Charles W. Corbaley having been challenged peremptorily by plaintiffs and excused; and Owen E. Graham having been challenged peremptorily by defendants and excused; and L. C. Turner having been challenged peremptorily by defendants and excused; and jurors C. A. Henderson and J. H. Byerley having been accepted by counsel for plaintiffs and by counsel for defendants and duly sworn as jurors to try this cause; and, in place of the last four jurors excused, namely, jurors Graham, Corbaley, Morgan and Turner, the following named petit jurors having been duly drawn, called and sworn on *voir dire*, to wit: Henry Kiesling, Sumner P. Hunt, John P. Newell and William H. Black; and said jurors having been examined by the court and by counsel for plaintiffs and by counsel for defendants and passed for cause; and William H. Black having been challenged peremptorily by defendants and excused; and Sumner

P. Hunt having been challenged peremptorily by defendants and excused; and John P. Newell having been challenged peremptorily by plaintiffs and excused; it is by the court ordered, on account of peremptory challenges, the peremptory challenge of juror Newell by plaintiff after plaintiff had passed for that defendants be, and they hereby are allowed two extra peremptory challenges, in addition to those given them by law; and Henry Kiesling having been accepted by counsel for plaintiffs and by counsel for defendants and duly sworn as a juror to try this cause; and, in place of the last three jurors excused, namely, jurors Hunt, Newell and Black, the following petit jurors having been duly drawn, called and sworn on *voir dire*, to wit: A. W. Bales, D. S. De Van and Albert S. Dixon; and said last named three jurors having been examined by the court and by counsel for plaintiffs and by counsel for defendants and passed for cause; and Albert S. Dixon having been challenged peremptorily by plaintiffs and excused; and A. W. Bales and D. S. De Van having been accepted by counsel for plaintiffs and by counsel for defendants and duly sworn as a juror to try this cause; and, in place of the last juror excused, namely, juror Dixon, C. M. Seeley, a petit juror, having been duly drawn, called, sworn on *voir dire*, examined by the court and by counsel for plaintiffs and by counsel for defendants and passed for cause, and said juror C. M. Seeley having been accepted by counsel for plaintiffs and by counsel for defendants and duly sworn as a juror to try this cause; and the impanellment of the jury being now concluded, said jury as so impanelled

and sworn consisting of the following named jurors,
to wit:

JURY.

1. Joseph A. Anker.
2. Walter W. James.
3. Henry Kettle.
4. L. T. Bradford.
5. James Calderwood.
6. Hugh M. McFarland.
7. C. W. Henderson.
8. J. H. Byerley.
9. Henry Kiesling.
10. A. W. Bales.
11. D. S. De Van.
12. C. M. Seeley.

And the court having admonished the jury that, during the progress of this trial, they are not to permit other persons to speak to them, nor themselves speak to other persons, about this cause, or anything connected with it, and that, until said cause is given them for consideration, under the instructions of the court, they are not to speak to each other about this cause or anything therewith connected; and court thereupon, and the balance of the panel having been excused until Friday, December 1st, at 10 a. m., and at the hour of 11:22 o'clock a. m., having taken a recess for 9 minutes; and now, at the hour of 11:31 o'clock a. m., court having reconvened; and counsel, defendants and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in

court; and the indictment having been read to the jury, and the pleas of not guilty of defendants Charles K. Holsman and Gideon M. Freeman having been announced to the jury by the clerk; now, on motion of Duke Stone, Esq., of counsel for defendants, it is ordered that all of the witnesses in this cause, except government witness C. E. Webster, postoffice inspector, be excluded from the court room during this trial except when actually upon the witness stand for the purpose of testifying herein; Clyde R. Moody, Esq., assistant U. S. attorney, of counsel for the United States, having made a statement to the jury of what the government expects to prove; and George S. Hupp, Esq., of counsel for defendants, having made a statement to the jury of what defendants expect to prove in their defense; and the court having given the jury the usual admonition; and court thereupon, at the hour of 11:58 o'clock a. m., having taken a recess until the hour of 2 o'clock p. m., of this day; until which time the jurors are excused; and now, at the hour of 2 o'clock p. m., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and Bryon J. Badham having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the government having offered an exhibit, which is admitted in evidence in its behalf, to wit: U. S. Ex. 1, store lease, E. A. Hoffman to Henry S. Giles, et al., dated May 22, 1912; it is, on motion and by consent, ordered that all

papers admitted in evidence and filed shall be deemed to have been read to the jury; and Fred C. Fuller having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the government having offered an exhibit, which is admitted in evidence in its behalf, to wit: U. S. Ex. 1-a, affidavit of G. M. Freeman as to physicians employed; and James B. Webster having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the government having offered in evidence an advertisement in the Los Angeles Examiner of July 14th, 1912, which is admitted in evidence as U. S. Ex. 2; and the government having offered substantially the same advertisement appearing in issues of said Los Angeles Examiner in July and August, 1912, in copies contained in bound volumes of said newspaper, which are admitted in evidence on behalf of the United States as U. S. Ex. 33 and U. S. Ex. 34, the number "32" not yet used; and the government having also offered certain other exhibits, which are admitted in evidence in its behalf, to wit: U. S. Ex. 2-a, stipulation as to mailing of letters to G. M. Freeman, etc.; U. S. Ex. 3, letter to G. M. Freeman, signed Clyde L. Coon; U. S. Ex. 4, letter to G. M. Freeman, signed Clyde L. Coon, of Aug. 29, 1912; U. S. Ex. 5, diagnosis blank, Claude L. Coon; U. S. Ex. 6, letter signed G. M. Freeman to Clyde L. Coon; and the court having given the jury the usual admonition; and court thereupon, at the hour of 3:32 o'clock p. m., having taken a recess for 8 minutes; and now, at the

hour of 3:40 o'clock p. m., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and the government having offered certain exhibits, which are admitted in evidence in its behalf, to wit: U. S. Ex. 7, letter to Clyde L. Coon, of Sept. 26, 1912; U. S. Ex. 8, letter to C. L. Coon, signed G. M. Freeman; U. S. Ex. 9, letter to C. L. Coon, signed G. M. Freeman; U. S. Ex. 10, letter to C. L. Coon, signed G. M. Freeman; U. S. Ex. 11, bottle containing mixture, tea, etc.; U. S. Ex. 12, letter, signed Cicero Hickman; U. S. Ex. 13, letter to Hickman, signed Freeman, of Aug. 13, 1912; U. S. Ex. 14, self-examination blank for men; U. S. Ex. 15, letter of Aug. 27, 1912; U. S. Ex. 16, letter, Freeman to Hickman; U. S. Ex. 17, letter, Freeman to Hickman; U. S. Ex. 18, letter, Freeman to Hickman; U. S. Ex. 19, letter, Freeman to Hickman; U. S. Ex. 20, letter, Freeman to Hickman; U. S. Ex. 21, letter, Hickman to Freeman; U. S. Ex. 22, letter, Freeman to Hickman; U. S. Ex. 23, bottle of mixture; U. S. Ex. 24, envelope and letter, letter to Freeman, signed John Bammes; U. S. Ex. 25, bottle of mixture; and Frank L. Cunningham having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the government having ordered certain exhibits, which are admitted in evidence in its behalf, to-wit: U. S. Ex. 26, envelope; U. S. Ex. 27, bottle; U. S. Ex. 28, envelope; U. S. Ex. 29, bottle; U. S. Ex. 30, envelope; U. S.

Ex. 31, bottle; and the court having given the jury the usual admonition; it is at the hour of 4:44 o'clock p. m. ordered that this cause be and the same hereby is continued until Wednesday, the 29th day of November, A. D. 1916, at 10 o'clock a. m., until which time the jurors are excused.

At a stated term, to wit: the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Wednesday, the twenty-ninth day of November, in the year of our Lord one hundred nine hundred and sixteen;

Present:

The Honorable Oscar A. Trippet, district judge.

No. 903 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, GIDEON M. FREEMAN, *et al.*,

Defendants.

This cause coming on this day for the trial of defendants Charles K. Holsman and Gideon M. Freeman before the court and a jury heretofore duly impanelled herein; Clyde R. Moody, Esq., and William F. Palmer, Esq., assistant U. S. attorneys, appearing as counsel for the United States; defendants Freeman and Holsman being present on bail, with their counsel, George S. Hupp, Esq., Duke Stone, Esq., and Mack Meader, Esq.; W. C. Wren being present as shorthand reporter

of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Frank S. Cunningham, a witness on behalf of the United States, having again taken the stand for further examination, and having given his testimony; and Charles H. Whitman and C. E. Webster, having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and C. S. Ranger having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the court having given the jury the usual admonition; and court thereupon, at the hour of 11:16 o'clock a. m., having taken a recess for 9 minutes; and now, at the hour of 11:25 o'clock a. m., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and Wirt B. Dakin having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the government having rested; and Duke Stone, Esq., of counsel for defendants, having made a statement to the jury on behalf of defendant Holsman; and the court having given the jury the usual admonition; and court thereupon, at the hour of 11:54 o'clock a. m., having taken a recess until the hour of 2 o'clock p. m. of this day, until which time the jurors are excused.

And now, at the hour of 2 o'clock p. m., court having reconvened; and defendants, counsel and shorthand reporter being present as before and counsel for

the respective parties having stipulated that the jury are present and all of said jurors being present in court; and Gideon M. Freeman, one of the defendants, having been called and sworn as a witness on behalf of defendants, and having given his testimony; and in connection with the testimony of said witness, defendants having offered for identification certain exhibits which are for identification marked with certain exhibit designations, to wit: Defts.' Ex. 1, correspondence of defendants' office, May, 1913; Defts.' Ex. 2, correspondence of defendants' office, June, 1913; Defts.' Ex. 3, correspondence of defendants' office, July, 1913; Defts.' Ex. 4, correspondence of defendants' office, August, 1913; Defts.' Ex. 5, correspondence of defendants' office, September, 1913; Defts.' Ex. 6, October, 1913; Defts.' Ex. 7, correspondence of defendants' office, November, 1913; and Defts.' Ex. 8, correspondence of defendants' office, December, 1913; and said Defendants' Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 having been offered in evidence on behalf of defendants, it is by the court ordered that said offer be, and the same hereby is denied, and said exhibits excluded; and the court having given the jury the usual admonition; and court thereupon, at the hour of 3:11 o'clock p. m., having taken recess for 11 minutes; and now, at the hour of 3:22 o'clock p. m., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and Gideon M. Freeman, one of the defendants, and a witness in their behalf, having again taken the stand for further examination, and having

given his testimony; and C. E. Webster, a witness on behalf of the United States, having again taken the stand for further examination, and having given his testimony; and Walter B. Sim and Ed. W. Hopkins having respectively been called and sworn as witnesses on behalf of defendants, and having given their testimony; and defendants having rested; and this cause having been argued to the jury, on behalf of the government, by William F. Palmer, Esq., assistant U. S. attorney, of counsel for the United States; and the court having given the jury the usual admonition; it is, at the hour of 4:30 o'clock p. m., ordered that this cause be, and the same hereby is continued until Friday, the 1st day of December, 1916, at 9:30 o'clock a. m., for further trial, until which time the jurors are excused.

At a stated term, to wit: the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Friday, the first day of December, in the year of our Lord one thousand nine hundred and sixteen:

Present:

The Honorable Oscar A. Trippet, district judge.

No. 903 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

This cause came on this day for the further trial of defendants Charles K. Holsman and Gideon M. Freeman before the court and a jury heretofore duly impanelled herein; Clyde R. Moody, Esq., and William F. Palmer, Esq., assistant U. S. attorneys, appearing as counsel for the United States; defendants Holsman and Freeman being present on bail, with their counsel, George S. Hupp, Esq., Duke Stone, Esq., and Mack Meader, Esq.; W. C. Wren being present as shorthand reporter of the testimony and proceeding, and acting as such; and the roll of the jury having been called, and all being present; and this cause having been further argued to the jury, on behalf of the defendants on trial, by Duke Stone, Esq., and George S. Hupp, Esq., of counsel for defendants; and the court having given the jury the usual admonition; and thereupon, at the hour of 10:49 o'clock a. m., court having taken a recess until the hour of 10:56 o'clock a. m. of this day; and now, at the hour of 10:56 o'clock a. m., court having reconvened; and defendants, counsel and shorthand reporter being present as before, except that Duke Stone, Esq., of counsel for defendants, is not present; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and this cause having been further argued to the jury, on behalf of the government in reply, by Clyde R. Moody, Esq., assistant U. S. attorney, of counsel for the United States; and Duke Stone, Esq., of counsel for defendants, having come into court at the hour of 10:57 o'clock a. m.; and the court having read to the jury its written instructions; it is, on motion of counsel for defendants

and by direction of the court, ordered that exceptions be, and hereby are noted herein on behalf of defendants to the refusal of the court to give such of the instructions requested by defendants as the court did refuse to give, and also to each and every of the instructions given by the court; and Josiah W. Bell, a deputy U. S. marshal, having been duly sworn to take charge of the jury; it is ordered, that, after the jury retire, the U. S. marshal for this district take the jurors to some suitable place for their dinner, said dinner, for the jurors and accompanying officers, to be at the expense of the United States, and that thereafter said marshal return said jurors to their room for deliberations concerning their verdict; the jury, at the hour of 12:01 o'clock p. m., retire in charge of said sworn officer.

No. 903 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

The jury, at the hour of 2:12 o'clock p. m., having come into court; Clyde R. Moody, Esq., and William F. Palmer, Esq., assistant U. S. attorneys, appearing as counsel for the United States; defendants Charles K. Holsman and Gideon M. Freeman being present on bail, with their counsel, George S. Hupp, Esq., Duke Stone, Esq., and Mack Meader, Esq.; W. C. Wren being present as shorthand reporter of the proceedings, and acting as such, and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in

court; and the jury having been asked if they have agreed upon a verdict, and the jurors having by their foreman replied that they have so agreed, and having been required to present their verdict, and their verdict having been read by the clerk; now, by direction of the court, said verdict is filed and recorded by the clerk, said verdict as so recorded being as follows, to wit:

*In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

No. 903 Crim.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHAS. K. HOLSMAN and GIDEON M. FREE-
MAN,

Defendants.

We, the jury in the above-entitled cause, find the defendant Chas. K. Holsman guilty as charged in the indictment, and the defendant Gideon M. Freeman guilty as charged in the indictment. With recommendation of leniency for both.

Los Angeles, California, December 1, 1916.

L. T. BRADFORD,

Foreman.

And said verdict having been read to the jury as so recorded, and the jurors having said that it is their verdict; it is now by the court ordered that said jurors be, and they hereby are excused from attendance upon the court until Tuesday, the 5th day of December,

1916, at 10 o'clock a. m.; and it is further ordered, on motion of Clyde R. Moody, Esq., assistant U. S. attorney, of counsel for the government, that this cause be, and the same hereby is continued until Monday, the 11th day of December, 1916, at 2 o'clock p. m., for the sentence of defendants Freeman and Holsman, said two defendants in the meantime to remain at large on their present bail bonds; and it is further ordered, on like motion, that U. S. Exhibits 33 and 34 may be withdrawn from the files in this cause.

Defendants' Requested Instructions.

I.

I instruct you in this case, that the gist of the allegations against the defendants is a conspiracy and the doing of an act or acts, to-wit, the mailing of letters set out in the indictment, in furtherance of the conspiracy.

You cannot find the defendants or either of them guilty of a conspiracy in the case, even though you believe such has existed as charged in the indictment, unless you further believe from the evidence, beyond a reasonable doubt, that the defendants or one of them mailed, or caused to be mailed the letters, or one of the letters set out in the indictment, in furtherance of the alleged conspiracy; because a conspiracy under the United States laws is not a crime, though it is an agreement or understanding to do an unlawful act or acts, unless the overt act or one of them alleged in the indictment is actually committed by the defendant or one of the defendants after the conspiracy is formed and in furtherance thereof, and hence, unless you be-

lieve from the evidence in this case, beyond all reasonable doubt, that the defendants had entered into a conspiracy, as alleged in the indictment, and further, that the defendants, or one of them, in furtherance of said conspiracy actually mailed, or actually caused to be mailed, the letters, or one of them, set out in the indictment, then it would be your duty to acquit the defendants.

DEFENDANTS' REQUESTED INSTRUCTIONS.

II.

I instruct you, that unless you believe from the evidence, beyond a reasonable doubt, that the defendants conspired together as alleged in the indictment, in devising a scheme to defraud, and knowingly used the mails in furtherance thereof, then no statement or act of either defendant should be considered against any other defendant, or defendants in determining whether or not there was a conspiracy as charged in the indictment. That is to say, before the act or acts of any defendant can be used or considered against another defendant or defendants, it must first appear beyond a reasonable doubt that the conspiracy existed, as alleged in the indictment.

DEFENDANTS' REQUESTED INSTRUCTIONS.

III.

I instruct you, that under the law what is known as decoy evidence, such as the sending of the two letters set out in the indictment, by the postoffice inspector, for the purpose of procuring an answer from the defendant, or one of them, may be used for the purpose

of apprehending or ascertaining whether a person is engaged in the commission of a criminal offense against the laws of the United States. But in this charge of conspiracy, unless you believe from the evidence beyond a reasonable doubt, that at the time the said decoy letter or letters were mailed to the defendants or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment; or unless the defendants had conspired together, as alleged in the indictment at the time of or before the sending said letter or letters by the postoffice inspector, then the evidence of said decoy letters is not alone sufficient upon which to base the verdict of guilty, because a government official cannot conspire with another person to violate the laws of the United States and it is against public policy for a government official to suggest or originate a conspiracy or any other crime, and hence, if you believe from the evidence in this case that a conspiracy as alleged, was suggested and planned by the postoffice inspector, or inspectors, and the defendants were not actually in said conspiracy as alleged, except as shown by a response to the letters of said postoffice inspector, then it will be your duty to acquit the defendants.

DEFENDANTS' REQUESTED INSTRUCTIONS.

IV.

I instruct you that it is against the policy of the laws of the United States to sustain a prosecution or conviction upon an indictment charging a conspiracy against the laws of the United States if the conspiracy

or plan originated solely in the mind or minds of the government officials, and hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendants at the time alleged in the indictment had formed a conspiracy as therein alleged, without the suggestion and origination of the same by the postoffice inspector, or inspectors, and independent thereof, then it will be your duty to acquit the defendants.

DEFENDANTS' REQUESTED INSTRUCTIONS.

V.

I instruct you that while it may be proper under the laws of the United States for a government officer to use decoy methods in apprehending crime, that is, to ascertain whether or not a person, or persons are actually engaged in an offense against the laws of the United States, nevertheless, the evidence, if any, or the facts or circumstances, if any, procured by said decoy method can only be considered by you in determining the question as to whether or not the defendants had actually entered into the conspiracy as charged in the indictment, and any fact, or facts, or circumstances acquired by said decoy letters are not of themselves sufficient to sustain a verdict of guilty unless you believe from the evidence beyond a reasonable doubt that the defendants had, independent of said decoy letters, entered into the conspiracy at the time and place as alleged in the indictment.

DEFENDANTS' REQUESTED INSTRUCTIONS.

VI.

I instruct you that unless you believe from the evidence beyond a reasonable doubt in this case, that the defendants or one of them actually mailed or actually caused to be mailed the letters or one of them, set out in the indictment, then it will be your duty to acquit the defendants, because unless the defendants, or one of them knew of, or in some way authorized the mailing of the letter, or letters set out in the indictment, then the defendants would not be guilty, regardless of whether or not you may believe there was, or was not, a conspiracy between them.

DEFENDANTS' REQUESTED INSTRUCTIONS.

VII.

I instruct you that a person cannot, as the agent or employee of another in any business, bind his employer in a criminal proceeding or charge, and his employer is not responsible for the acts of the employee in committing a criminal offense, unless you believe from the evidence beyond a reasonable doubt, that the employer in some way knew of the act or acts of the employee, alleged to be criminal, or in some way authorized the act or acts of the employee; and hence, unless you believe from the evidence, beyond a reasonable doubt, that the defendants in some way knew of, or intentionally authorized the mailing of the letter or letters set out in the indictment, then it will be your duty to acquit the defendants.

DEFENDANTS' REQUESTED INSTRUCTIONS.

VIII.

I instruct you that before you can find a verdict of guilty against the defendants in this case, that you must find that all of the following conditions exist:

(a) That there was a conspiracy between them, as alleged in the indictment.

(b) That the object of that conspiracy was that the said defendants should devise a scheme or plan to defraud the persons, as alleged in the indictment, and

(c) That said defendants intended the use of the United States mails in carrying out or in the furthering of the object of such conspiracy.

And it is necessary before you are authorized to find a verdict of guilty in this case, that you believe all of the above elements to exist in this case. It is not sufficient that one of them exist, but they all must have existed, as alleged in the indictment, and to your satisfaction, beyond a reasonable doubt, before you are authorized to convict the defendants.

DEFENDANTS' REQUESTED INSTRUCTIONS.

No. IX.

I instruct you that the principal or master is not criminally liable for the acts of his agent or servant even though done in the general course of his employment, unless such acts of the agent or servant are authorized or consented to by the principal or master and that no authority to do a criminal act will be presumed. Hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant,

Holsman, actually mailed the letter or letters set out in the indictment, or caused the same to be mailed, or in some way knowingly authorized or acquiesced in the mailing thereof in furtherance of the scheme as charged in the indictment, then it will be your duty to acquit him, even though you may believe from the evidence that the defendant Sims was employed by the defendants to care for the correspondence and answering letters, even though you believe that the answering of letters by the defendant Sims was in the course of his employment.

DEFENDANTS' REQUESTED INSTRUCTIONS.

No. X.

I instruct you that under this charge of conspiracy, before you are authorized to convict the defendants, or either of them, you must believe beyond a reasonable doubt, that they had an understanding or agreement between or among themselves to defraud any and all persons who could be induced to write to them as charged in the indictment. And further, as a part of said conspiracy they intended the use of the mails in furtherance of said conspiracy.

The first question for you to consider is, was there a conspiracy? That is to say, did the defendants conspire or agree together and between or among themselves to commit the offense against the United States, as charged in the indictment? And, in the next place, did they enter into an agreement, or plan by which it was agreed or understood between or among themselves that they would defraud any and all persons, as charged in the indictment? And, in the next place, did they

knowingly or intentionally mail, or cause to be mailed either of the letters charged in the indictment?

Before you are authorized to convict the defendants or either of them, you must believe beyond a reasonable doubt, that they intended to defraud in the manner and by the use of the means set out in the indictment.

If the defendants, acting as specialists in the treatment of diseases acted in good faith and honestly believed in the representations which they made, if any, and did not by any of their said acts, as charged in the indictment, intend to defraud any person or persons, then it is your duty to acquit the defendants.

DEFENDANTS' REQUESTED INSTRUCTIONS.

XI.

I instruct you that though you may believe from the evidence that the defendant Holsman was financially interested in the office conducted at Los Angeles at the time alleged in the indictment, yet unless you believe from the evidence beyond a reasonable doubt, that he knew of or consented to or in some way authorized the mailing of the letters or one of them set out in the indictment, then you cannot convict him, and it will be your duty to find a verdict of not guilty as to him.

No. 12.

I instruct you that it is not a violation of the laws of the United States for a physician to advertise in his profession or to advertise his method of treatment. ~~That before you can convict the defendants or either of them, you must be convinced beyond all reasonable doubt that they conspired to use the mails as set out~~

in the indictment and for the purposes alleged in the indictment.

You are not to be influenced and must not be influenced to any extent in the consideration of this case by prejudice, if any should come into your minds, against a professional man advertising.

[Endorsed]: No. 903 Crim. U. S. District Court, Southern District of California, Southern Division. United States of America vs. Chas. K. Holsman, et al. Instructions requested by deft. Holsman. Filed Dec. 1, 1916. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

Instruction Given.

Gentlemen of the Jury:

The indictment in this case was brought under sections 37 and 215 of the United States Criminal Code, the former section being, in substance, as follows:

"If two or more persons conspire * * * to commit an offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be" punished as prescribed in said section.

The offense which it is alleged the defendants conspired to commit was a violation of said section 215, which is, in substance, as follows:

"Whoever having devised, or intending to devise, any scheme or artifice to defraud * * * shall, for the purpose of executing said scheme or artifice, or attempting so to do, place or cause to be placed, any letter * * * in any postoffice * * * of the

United States * * * to be sent or delivered by the postoffice establishment of the United States, shall be punished" as in said section prescribed.

The indictment in this case is against Charles K. Holsman, Henry L. Giles, Gideon M. Freeman, Ambrose C. Sims and Otto C. Joslin (since deceased). Only two of the defendants indicted, namely—Charles K. Holsman and Gideon M. Freeman, are now on trial. There being five persons named in the conspiracy, it is not necessary for the government to show that both Holsman and Freeman are guilty. That is to say, it is not necessary to show that they conspired together. It is sufficient to show that they or either of them conspired with any of the other defendants. It is necessary, of course, that two persons be in a conspiracy. Therefore, you can convict either one or both of the defendants on trial, and the instructions hereafter, when they refer to and speak of defendants, refer to either of the defendants. Before you can convict either of the defendants it must be shown that he conspired with one of the other defendants named in the indictment.

The charge against the defendants on trial, comprehensively stated, is that they conspired together or with one of the other persons named in the indictment, first to devise a scheme to defraud, and that they did devise such scheme to defraud as set out in the indictment, and, second, that they likewise conspired to place or cause to be placed in the postoffice of the United States, at the city of Los Angeles, California, letters addressed to persons intended to be so defrauded, to be sent and delivered to said persons by the postoffice establishment

of the United States for the purpose of executing said scheme or attempting so to do, and, third, that the defendants for the purpose of effecting and executing said scheme, or attempting so to do, placed or caused to be placed in said postoffice, one of the letters set forth in the indictment. Said conspiracy and scheme are fully set forth and described in the indictment which has been read to you and will, if you desire it, be with you in the jury room; therefore, it need not be restated here.

The defendants on trial, of course, cannot be convicted except upon proof of the particular charge stated in the indictment, and the evidence in the case should satisfy your minds that a scheme to defraud was devised as set forth, and that part of the scheme was to use the mails as described in the indictment.

You will observe that the offense charged against the defendants is not that of using the mails, in execution of a fraudulent scheme, but of conspiracy to so use the mails.

You will be called upon to consider, among others, the following questions:

Was there such a conspiracy, as alleged in the indictment? And did the defendants for the purpose of effecting the objects of the conspiracy, place or cause to be placed in said postoffice, to be sent and delivered by mail, the letters described in the indictment, or either of them?

If the evidence satisfies you beyond a reasonable doubt of the existence of said conspiracy, and that defendants, for the purpose of effecting the objects of said conspiracy, placed or caused to be placed in said

postoffice, to be sent and delivered by mail, said letters, or either of them, you will find the defendants guilty as charged in the indictment. If, however, the evidence fails to so satisfy you of the existence of said conspiracy, or that defendants, for the purpose of effecting the objects of said conspiracy, placed or caused to be placed either of said letters in said postoffice, to be sent and delivered by mail, you will find defendants not guilty.

The court further instructs you that a conspiracy is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means.

From this definition of conspiracy it follows, of course, that there can be no conspiracy where one individual acts by or for himself only.

A mere mental purpose cannot justify a conviction of conspiracy. A common design is of the essence of the charge

A person, therefore, in order to become a party to a conspiracy, must combine with someone else to effect the objects of the conspiracy by the means agreed upon.

The court further instructs you that, to constitute a conspiracy it is not necessary that there should be an explicit or formal agreement between the alleged conspirators.

Though the common design is of the essence of the charge it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing

one part and another another part of the same so as to complete it, with a view of attaining the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.

The evidence in proof of a conspiracy may be, and from the nature of the case generally will be, circumstantial.

The court, however, further instructs you that, where circumstantial evidence is relied upon to establish the conspiracy, or any other fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy, or other fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

You are further instructed, with reference to the proof of mailing the letters set up in the indictment, that it is not essential to the commission of the offense charged, that such letters be deposited in the mail by the defendants themselves, or even by another acting under their express direction, because a person is equally responsible for the mailing of any particular letter if it is deposited in the postoffice as a natural or probable consequence of any act intentionally done by such person with knowledge at the time thereof that such act will naturally and probably result in the mailing of such letter.

You are further instructed that a person is responsible for the mailing of any letter if he sets in

operation and makes use of any agency which, as he knows at the time, would according to its established and regular course, carry such letter through the mail to the person or persons to whose attention he designed such letter be brought.

The court further instructs you that, while the acts or declarations of a co-conspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during the existence and in furtherance of the unlawful combination when proven, is not only evidence against him, but is evidence against the other conspirator who, if the combination is proved, is as much responsible for such act or declaration as if done or made by himself.

You must not, however, permit yourself to use against either defendant, anything said or done outside the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt, that at the time the things were said or done a conspiracy existed between the party saying and doing the things and the defendant to be effected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy.

You are further instructed that the official postmark of the Los Angeles postoffice on the envelope enclosing one of the letters set forth in the indictment, and which has been introduced in evidence, is *prima facie* proof that said letter was mailed at said postoffice.

It is lawful that what is known as decoy letters, such as the letters sent by the postoffice inspector in this case for the purpose of procuring an answer from the

defendants, or one of them, may be used for the purpose of ascertaining whether the person addressed is engaged in the commission of a criminal offense against the laws of the United States. If at the time the said decoy letter or letters were mailed to the defendants, or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment, and the said defendants in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy.

A government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime. The conspiracy with which the defendants are charged must be proven to exist independently of any inducement to enter therein by any government official. In other words, if the conspiracy existed, it does not matter what the government officers did in order to procure evidence to prove it.

It is admitted by the government in this case that each of the letters set out in the indictment and alleged therein to be the overt acts pursuant to the accomplishment of the purpose of the conspiracy alleged in the indictment, were received by the addressees therein respectively in reply to letters respectively addressed to the defendant G. M. Freeman, M. D., either by a United States postal inspector, or by another procured by

the inspector so to do, and that the letters so addressed to said defendant were addressed to him for the purpose of giving to the government information as to whether or not the defendants charged in the indictment were engaged in an unlawful use of the mails. These letters so addressed to said defendants may be properly designated as decoy letters. You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action. You are further instructed that a government officer suspecting that a person or persons may be engaged in a business ~~offensive to good morals or~~ in violation of the laws of the United States, has a right to seek information under an assumed name, directly from such person or persons so suspected. That if such suspected person or persons respond to such inquiry for such information, and by so responding violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official. ~~You are therefore instructed that it is immaterial in this case that the said letters set out in the indictment were written and transmitted through the mails in answer to decoy letters, which decoy letters were procured to be sent by a government official.~~

Grimm vs. United States, 156 U. S. 605;

Goode vs. United States, 159 U. S. 669;

Montgomery vs. United States, 162 U. S. 410.

The court further instructs you that you are the sole judges of the facts and credibility of witnesses, and, in passing upon the credibility of witnesses you may consider, together with all the evidence in the case, their intelligence or lack thereof; their relation to the controversy and to the parties; the interest, if any, they have in the result of the trial; their prejudices and motives; their hopes and fears; their bias or impartiality; the reasonableness or otherwise of the statements they make—together with their manner upon the witness stand, and should give to their testimony such weight as you believe it entitled to receive.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter here involved, the jury may distrust his testimony in other respects, and are at liberty to reject the whole or any part of it.

The court further instructs you that the law permits a defendant, at his own request, to testify in his own behalf.

The defendant Freeman has availed himself of this privilege, and his testimony is to be treated like the testimony of any other witness—that is, it is for you to say, remembering his testimony, his demeanor on the witness stand, his interest in the result of the trial, together with all the evidence in the case, whether or not he has told the truth.

You are instructed that you are not to consider the failure of any defendant to take the witness stand as having any bearing whatever on the question of his guilt or innocence, and you should not allow the fact

that any defendant has failed to testify in his own behalf to influence you in the slightest degree.

I instruct you that it is not a violation of the laws of the United States for a physician to advertise in his profession or to advertise his method of treatment. You are not to be influenced and must not be influenced to any extent in the consideration of this case by prejudice, if any should come into your minds, against a professional man advertising.

The court further instructs you that neither the finding of an indictment, nor any allegation thereof, raises any presumption whatever of the defendant's guilt, but the burden of proof is upon the government, and that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt, and that this rule applies to every material element of the offense charged. The court further instructs you that a reasonable doubt is a doubt which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

You are instructed that a defendant in a criminal case is entitled to the individual opinion of each member of the jury, and that no member of the jury should vote for a conviction of such defendant because of the

opinion of the other members of the jury, so long as he has a reasonable doubt as to the guilt of such defendant, but this does not mean that you should not consult together and try and agree upon a verdict.

[Endorsed]: No. 903 Criminal. U. S. District Court, Southern District of California, Southern Division. United States of America vs. Chas. K. Holsman et al. Instructions given. Filed Dec. 1, 1916. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

*In the District Court of the United States, in and for
the Southern District of California, Southern Division.*

No. 903 Crim.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHAS. K. HOLSMAN and GIDEON M. FREEMAN,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find the defendant Chas. K. Holsman guilty as charged in the indictment, and the defendant Gideon M. Freeman guilty as charged in the indictment, with recommendation for leniency for both.

Los Angeles, California, December 1, 1916.

L. T. BRADFORD,

Foreman.

[Endorsed]: No. 903. Criminal. U. S. District

Court, Southern District of California, Southern Division. United States of America vs. Chas. K. Holsman *et al.* Verdict. Filed Dec. 1, 1916. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy.

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

Motion for New Trial.

Comes now the defendant, Chas. K. Holsman, one of the defendants in the above entitled cause, and moves this court to vacate and set aside the verdict of guilty rendered herein and recorded on December 1st, 1916, and grant to this defendant a new trial herein for the following reasons:

I.

That the said verdict is contrary to the evidence.

II.

That the said verdict is contrary to the law.

III.

That the court misdirected the said jury in matters of law, to which the defendant then and there duly excepted.

IV.

That the court erred in the decision of questions of law and the admission and rejection of evidence during

the course of the trial, to which the said defendant then and there duly excepted.

V.

That the said court erred in certain particulars of its general charge to the jury, each of which errors were excepted to by the defendant at the time.

VI.

That the court erred in refusing to give to the jury certain instructions requested by the defendant, to which refusal the defendant then and there duly excepted.

VII.

That the court erred in refusing to admit in evidence a certain lot of letters and correspondence offered by the defendant relating to the conduct of the business complained of, the same being the Defendant's Exhibit (1) *et seq.*

VIII.

That the court erred in admitting in evidence against this defendant that certain affidavit made by the defendant Gideon M. Freeman and which contained a statement against this defendant as there had been no proof of a conspiracy at the time of said admission; to which admission of evidence the defendant then and there duly excepted.

IX.

The court erred in admitting in evidence two bound volumes of the Los Angeles Examiner for the months of July and August, 1912, each of which purported to contain certain advertisements of the defendants, because no foundation whatever had been laid for ad-

mission of the same; to which admission the defendant then and there duly excepted.

X.

Misconduct on the part of the counsel for the government which prevented the defendant from having a fair and impartial trial, to which defendant then and there duly excepted.

XI.

That there were other errors of law appearing upon the trial prejudicial to the defendant and to which he then and there duly excepted.

XII.

That the court erred in refusing to sustain the demurrer of the defendant to the indictment herein, to which the defendant then and there duly excepted.

That this motion for a new trial will be made and based upon the minutes of the court, including the notes of the evidence taken on the trial by the shorthand reporter and any and all records of this cause including the indictment, proceedings, records, exhibits, instructions and evidence offered and received, and any and all papers and pleadings on file in this cause and all motions made herein.

Dated this December 11th, 1916.

DUKE STONE,

Attorney for Said Defendant.

[Endorsed]: Original. Case No. 903 Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman *et al.*, defendants. Motion for new trial. Copy of within rec'd this Dec. 11-'16. Clyde R. Moody, Asst. U. S. Atty.

Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy. Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for said defendant.

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN, et al.,

Defendants.

Motion for New Trial.

Comes now the defendant, Gideon M. Freeman, one of the defendants in the above entitled cause, and moves this court to vacate and set aside the verdict of guilty rendered herein and recorded on December 1st, 1916, and grant to this defendant a new trial herein for the following reasons:

I.

That the said verdict is contrary to the evidence.

II.

That the said verdict is contrary to the law.

III.

That the court misdirected the said jury in matters of law, to which the defendant then and there duly excepted.

IV.

That the court erred in the decision of questions of law and the admission and rejection of evidence during

the course of the trial, to which the said defendant then and there duly excepted.

V.

That the said court erred in certain particulars of its general charge to the jury, each of which errors were excepted to by the defendant at the time.

VI.

That the court erred in refusing to give to the jury certain instructions requested by the defendant, to which refusal the defendant then and there duly excepted.

VII.

That the court erred in refusing to admit in evidence a certain lot of letters and correspondence offered by the defendant relating to the conduct of the business complained of, the same being the Defendant's Exhibit (1) *et seq.*

VIII.

The court erred in admitting in evidence two (2) bound volumes of the Los Angeles 'Examiner' for the months of July and August, 1912, respectively, each of which purported to contain certain advertisements of the defendants, because no foundation whatever had been laid for the proper admission of the same; to which admission the said defendant then and there duly excepted.

IX.

Misconduct on the part of the counsel for the government which prevented the defendant from having a fair and impartial trial; to which said misconduct the said defendant then and there duly excepted.

X.

That there were certain errors of law appearing upon the trial of this cause prejudicial to this defendant and to which errors he then and there duly excepted.

XI.

That the court erred in refusing to sustain the demurrer of the defendant to the indictment herein, to which refusal the defendant then and there duly excepted.

That this motion for a new trial in the above entitled cause will be made and based upon the minutes of the court, including the notes of the evidence taken on the trial by the shorthand reporter and any and all records of this cause including the indictment, all proceedings, records, exhibits, instructions and evidence offered and received, and any and all papers and pleadings on file in this cause and all motions made herein.

Dated this 11th day of December, 1916.

MACK E. MEADER,

Attorney for Said Defendant Gideon M. Freeman.

[Endorsed]: No. 903 Crim. In United States District Court, Southern District of California, Southern Division. United States of America vs. Charles K. Holsman *et al.*, defendants. Motion for new trial. Copy of within rec'd this Dec. 11, 1916. Clyde R. Moody, Asst. U. S. Atty. Filed Dec. 11, 1916. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy. Mack E. Meader, Los Angeles, Cal., #532 Higgins Bldg., solicitor for the defendant, Gideon M. Freeman. Attorney for said defendant.

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

**Motion of Charles K. Holsman in Arrest of
Judgment.**

Comes now defendant Charles K. Holsman and moves the court in errest of the judgment in the above entitled cause upon the following ground:

The indictment herein fails to charge any offense under any statute of the United States.

DUKE STONE,

Attorney for Said Defendant.

[Endorsed]: Case No. 903 Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman, *et al.*, defendants. Motion of Charles K. Holsman in arrest of judgment. Rec'd copy of the within motion this 5th day of Jan., '17. C. R. Moody, Asst. U. S. Atty. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy. Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for said defendant.

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIDEON M. FREEMAN, *et al.*,

Defendants.

**Motion of Gideon M. Freeman in Arrest of
Judgment.**

Comes now defendant, Gideon M. Freeman, and moves the court in arrest of the judgment in the above entitled cause upon the following ground:

The indictment herein fails to charge any offense under any statute of the United States.

M. E. MEADER,

Attorney for Said Defendant.

[Endorsed]: Case No. 903 Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Gideon M. Freeman *et al.*, defendants. Motion of Gideon M. Freeman in arrest of judgment. Rec'd copy of the within this 5th day of Jan., 1917. C. R. Moody, Asst. U. S. Atty. Filed Jan. 5, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy. M. E. Meader, 532 Higgins Building, Los Angeles, California. Phone: F-2132. Attorney for said defendant.

Copy of Minute Order.

At a stated term, to wit: the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Friday, the fifth day of January, in the year of our Lord one thousand nine hundred and seventeen:

Present:

The Honorable Oscar A. Trippet, district judge.

No. 903 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

This cause coming on this day to be heard on the separate motions of defendants Charles K. Holsman and Gideon M. Freeman for a new trial, and also coming on for the sentence of said defendants Holsman and Freeman; Clyde R. Moody, Esq., and William F. Palmer, Esq., assistant U. S. attorneys, appearing as counsel for the United States; defendants Holsman and Freeman being present on bail, with their counsel, Duke Stone, Esq., and Mack Meader, Esq.; W. C. Wren being present as shorthand reporter of the proceedings, and acting as such; and said motions for new trial having been argued, in support thereof, by Duke Stone, Esq., of counsel for defendants, and in opposition thereto by Clyde R. Moody, Esq., assistant U. S. attorney, of counsel for the United States; and court,

at the hour of 10:54 o'clock a. m., having taken a recess for 10 minutes; and now, at the hour of 11:04 o'clock a. m., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and W. C. Wren, shorthand reporter, having read certain matter from his shorthand notes of testimony and proceedings taken at the trial of this cause; and said motions for new trial having been further argued, in opposition thereto, by Clyde R. Moody, Esq., assistant U. S. attorney, of counsel for the United States, and in support thereof in reply by Duke Stone, Esq., of counsel for defendants; and the court having announced its conclusions regarding said motions; it is now by the court ordered that each of said motions of defendants Holsman and Freeman for new trial be, and the same hereby is overruled; to which ruling of the court, on motion of defendants Holsman and Freeman and by direction of the court, exceptions are hereby noted herein on behalf of said defendant Holsman and also on behalf of said defendant Freeman; and separate motions in arrest of judgment having been filed in open court on behalf of defendants Holsman and Freeman; and said motions in arrest of judgment having been argued, in support thereof by Mack Meader, Esq., of counsel for said defendants, it is now by the court ordered that said separate motions of defendants Holsman and Freeman in arrest of judgment be, and each of said motions hereby is denied, to which ruling of the court, on motion of defendants Holsman and Freeman and by direction of the court, exceptions are hereby noted herein on behalf of said defendant Holsman and also on behalf of said defendant Free-

man; it is thereupon, at the hour of 11:56 o'clock a. m., ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock p. m. of this day for the sentence of defendants Holsman and Freeman.

No. 903 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

This cause coming on at this time for the sentence of defendants Charles K. Holsman and Gideon M. Freeman; Clyde R. Moody, Esq., and William F. Palmer, Esq., assistant U. S. attorneys, appearing as counsel for the United States; defendants Holsman and Freeman being present on bail, with their counsel, Duke Stone, Esq., and Mack Meader, Esq.; and statements in mitigation of sentence having been made by Mack Meader, Esq., and by Duke Stone, Esq., of counsel for defendants; the court thereupon pronounces sentence upon said defendants Freeman and Holsman for the offense of which they now stand convicted, namely, the offense of violation of section 37 of the United States Criminal Code, conspiracy to violate section 215 of said United States Criminal Code, using mails in scheme to defraud, as follows, to wit: the judgment of the court is that the defendant Gideon M. Freeman pay a fine of fifteen hundred (1500) dollars, and that he stand committed to the county jail of Los Angeles county, California, until said fine is paid, and that the defendant Charles K. Holsman pay a fine of fifteen hundred (1500) dollars and be imprisoned in the county jail of

Los Angeles county, California, for the term of three (3) months, and that said defendant Holsman stand further committed to said county jail of Los Angeles county, California, until said fine is paid; to which sentences of the court on motion of defendants Freeman and Holsman & by direction of the court exceptions are hereby noted herein on behalf of defendant Gideon M. Freeman and also on behalf of defendant Charles K. Holsman; whereupon, on motion of defendants, it is ordered that said defendants Freeman and Holsman be, and they are hereby granted a stay of execution of judgment herein for ten (10) days; and, good cause appearing therefor, it is further ordered that the said defendants Gideon M. Freeman and Charles K. Holsman be allowed to be at large upon their present bonds until the 10th day of January, 1917, and it is further ordered that the bond on writ of error herein is hereby fixed in the sum of three thousand (3000) dollars as to each of said defendants Freeman and Holsman.

*In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

No. 903 Crim.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHARLES K. HOLSMAN, et al.,

Defendants.

I, Wm. M. Van Dyke, clerk of the District Court of the United States for the Southern District of Cali-

fornia, do hereby certify the foregoing to be a full, true and correct copy of an original judgment entered in the above-entitled cause; and I do further certify that the papers hereto annexed constitute the judgment roll in said cause.

Attest my hand and the seal of said District Court, this 10th day of January, A. D. 1917.

(Seal)

WM. M. VAN DYKE,

Clerk.

By Geo. W. Fenimore,

Deputy Clerk.

[Endorsed]: No. 903 Crim. In the District Court of the United States for the Southern District of California, Southern Division. United States of America vs. Charles K. Holsman *et al.* Judgment roll. Filed January 10, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Recorded min. bk. book No. 27, page 24.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON FREEMAN,

Defendants.

**Bill of Exceptions on Behalf of Defendants, Charles
K. Holsman and Gideon M. Freeman.**

To Albert Schoonover, United States Attorney; W. F.
Palmer and Clyde R. Moody, Assistant United
States Attorneys:

Herewith is tendered to you and each of you and
within the time provided by order of the court, the de-
fendants' proposed bill of exceptions in the foregoing
entitled cause.

Dated Los Angeles, California, this 27 day of Feby.,
1917.

DUKE STONE,
MACK MEADER,
Attorneys for Defendants.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON M. FREE-
MAN,

Defendants.

PROPOSED BILL OF EXCEPTIONS ON BEHALF OF DE-
FENDANTS CHARLES K. HOLSMAN AND GIDEON M.
FREEMAN.

Be it remembered that heretofore the grand jury of
the United States of America, in and for the Southern
District of California, Southern Division, did find and
return in the above-entitled court its indictment against

Charles K. Holsman and Gideon M. Freeman, among other persons, therein alleged to be co-conspirators, and thereafter said Charles K. Holsman and Gideon M. Freeman appeared in said court and entered their pleas to said indictment after demurrer thereto overruled, to which an exception was taken and allowed, and the case being at issue the same came on for trial on November 28th, 1916, before the said District Court, Honorable Oscar A. Trippet presiding; the United States of America, plaintiff, represented by William F. Palmer and Clyde R. Moody, assistant United States attorneys, and the defendants being represented by Duke Stone, George S. Hupp and Mack Meader. Upon instructions the clerk read the indictment upon which the defendants were to be tried to the jury which had theretofore been duly impanelled and sworn to try the case. Thereupon the following proceedings were had.

Testimony of Byron J. Badham.

“My name is Byron J. Badham. My father-in-law owns the premises at 327½ South Spring street. I identify the lease shown me as United States Exhibit No. 1.” (The lease was thereupon read to the jury by the assistant United States attorney as Government’s Exhibit 1) and which lease was dated May 22d, 1912, and between E. A. Hoffman, the lessor, and Henry L. Giles and Charles K. Holsman, lessees, the latter two being two of the defendants in this cause, and which lease covered the second floor of the building at 327½ South Spring street, for the purpose of carrying on the business of physicians and surgeons and was for the period of five years.

Testimony of Dr. Frank C. Fuller.

"My name is Frank C. Fuller. I am a physician. I know Doctors Holsman and Freeman. I first met Dr. Holsman sometime in the summer of 1912 at 327½ South Spring street, and first met Dr. Freeman about a year prior to that. In 1912 I was employed at 327½ South Spring street. I think I began there about the third week of May, 1912, and worked until the next May, about the middle of the month. When I first went to work the office was situated at 305½ South Spring street and shortly after May, 1912, the offices were removed to 327½ South Spring street and Doctor Freeman was in this same office. Dr. Freeman left the offices at No. 327½ sometime in April, 1913, and I was there about 30 days after he left. I saw Doctor Holsman at 327½ South Spring street for about three weeks which I think was the latter part of July, 1912. I think he was at this address every day during these three weeks. He had charge of the office during Doctor Freeman's absence. He was not there more than once or twice after that to my knowledge and this was at the latter part of the year 1912."

Cross-Examination

of said Frank C. Fuller.

"I was employed at 327½ South Spring street to treat patients under the supervision of Doctor Freeman. I was working on a salary. While I was there Doctor Freeman was in charge of the office and Miss Wilhelm was the stenographer. Mr. Sims (one of the defendants herein) was the man in charge of the drugs and

(Testimony of Dr. Frank C. Fuller.)

had charge of the moneys. I was in the office at said address for about a year and Doctor Holsman was only there for about three weeks in the summer of 1912 and for a few days a little later in the year. I think Doctor Holsman did treat patients while he was there." At this point it was attempted to be shown by the witness what the equipment of the office consisted of, particularly as to the drug room and what it contained, that is, the amount and extent of the drugs and the supply and how it was kept up; and as to whether or not there was a static machine there for the treatment of diseases; and who had charge of and did the work of receiving and answering letters. On objection of counsel for the government that said cross-examination was not competent cross-examination and incompetent, irrelevant and immaterial, the court sustained the objection to this line of cross-examination, to which the defendants and each of them excepted. Whereupon this witness was temporarily excused from the witness stand.

GOVERNMENT EXHIBIT NO. 1-A.

When the witness Dr. F. C. Fuller was excused from the stand the following proceedings occurred, to wit:

By Mr. Moody, assistant U. S. attorney:

"If the court please, I desire to introduce into evidence an affidavit which I hold in my hand, and which counsel has examined.

Mr. Stone: To this we object, and I make the objection on behalf of the defendant Holsman, as hearsay; and we object on behalf of the other defendant as

incompetent, irrelevant and immaterial. It has no bearing on the issues whatever.

Mr. Moody: Does the court desire to examine the document and pass on it?

The Court: Well, Mr. Moody, I have an objection here as being incompetent. I don't see how you can introduce it unless you prove it was executed.

Mr. Stone: Your Honor got the objection as to the other defendant, that it was hearsay?

Mr. Moody: I don't think there is any dispute about the execution of it, is there?

Mr. Stone: Well, I don't know.

Mr. Moody: Well, if there is any dispute, I will remove the dispute. I presumed there would not be, in view of the signature that is on there. If there is any dispute, I will call a witness to prove its execution.

Mr. Hupp: There is no dispute as to the signatures.

The Court: What is that?

Mr. Hupp: There is no dispute as to the signatures.

Mr. Moody: No dispute as to the signatures.

The Court: Let me see it.

(The paper was handed to the court.)

The Court: The objection will be overruled.

Mr. Moody: Mark it as United States Exhibit Number 2. I desire that that be marked United States Exhibit 1-A, in order that the other exhibits may be kept in the proper order, and save the clerk re-marking the entire number that we expect to be introduced.

Mr. Stone: Let the defendant Holsman have an exception to that ruling as to him, on the ground that it is hearsay as to him.

The Court: Yes, sir.

Mr. Hupp: And exception on the part of the defendant Freeman.

Mr. Moody: (Reading.) "State of California, county of Los Angeles, s s"—

The Court: Just a moment, Mr. Moody.

Mr. Stone: That the record may show, in a conspiracy charge it would not be admissible as a declaration of one of the conspirators at this stage of the trial; and, secondly, it is hearsay pure and simple against the defendant Holsman.

The Court: What is the date of it?

Mr. Moody: September 11, 1911.

The Court: Well, Mr. Moody, it could only go in as a statement or declaration of one of the conspirators, after the formation of the conspiracy, and while it was existing.

Mr. Stone: If there was one.

The Court: And while it was existing. It seems to me like—

Mr. Hupp: You will notice, if the court please, if the court will permit me, on page 1 of the indictment it is alleged that the conspiracy was entered into in the year 1912, whereas this paper that they have offered was a year prior to that time, and therefore would be clearly inadmissible as being outside the issues and before the conspiracy was originated.

Mr. Palmer: Of course, Your Honor, the allegation of a date in an indictment is subject to the proof, and it is not a material allegation, provided that the date is before the time of the returning of the indictment. That is a well acknowledged principle of law. And the fact that this is alleged to have been in 1912, and

that this evidence applies to 1911—we have already had a witness on the stand that shows that the very office that is alleged here was moved from the place that is stated in this affidavit, 305½ South Spring street, to the place that is mentioned in the indictment. So that it is connected, and connecting these people together at that time. And the fact that it is alleged the conspiracy was formed in 1912 cannot keep us from showing it, provided we show it was formed at a time before the returning of the indictment, and the overt act—

The Court: I don't think that the dates are very material in this thing, but then your statement here is—

Mr. Stone: If Your Honor will pardon me for making this additional statement, I understand the rule to be in a conspiracy charge that you cannot admit the statements of any one of the alleged conspirators against another alleged conspirator until the government has first proved *prima facie* a conspiracy.

The Court: Yes.

Mr. Stone: There is no doubt about that being the law. Now my first objection, then, is to the fact that there is no evidence of a conspiracy so far in this trial. In the second place, that any affidavit would be hearsay as to parties who did not make the affidavit. Now, Your Honor would not for a minute admit testimony if one of the defendants should have stated to somebody that certain people were practicing in an office on a certain date; that would be pure hearsay, whether it is in writing or verbal.

Mr. Palmer: This affidavit is a paper which is required to be made by law, and made by one of these

defendants. It is a record of an office required to be made by law, and he has made this, so that it cannot possibly be hearsay so far as that defendant is concerned.

The Court: That is entirely so. There is no doubt about that. But the other defendant has got to be considered. He makes an objection to it.

Mr. Palmer: Now we have connected—

The Court: Now what proof is here about their office at 305½ South Spring street?

Mr. Palmer: The testimony of Doctor Fuller, just on the stand. He testified that at the time of his employment, in May, 1912, that the office was at 305½ South Spring street, and that afterwards, in about June or July of that year, it was removed to 327½.

The Court: All right. I didn't understand those numbers. I will overrule the objection.

Mr. Stone: To which the defendants, and each of them, if Your Honor please, except. *Ex. 2.*

(Thereupon Mr. Moody read to the jury the paper so offered and received in evidence, the same being in the words and figures following, to-wit:)

‘PLAINTIFF’S EXHIBIT NO. 1-A.
AFFIDAVIT.

State of California, County of Los Angeles—ss.

G. M. Freeman, being first duly sworn, deposes and says: I am a physician duly licensed by the State Board of Medical Examiners of the state of California, and am practicing medicine at number 305½ South Spring street in the city of Los Angeles, county of Los Angeles, state of California, and that the following are

the names of each and every person practicing or assisting in the practice of medicine and surgery in my said office, to-wit:

G. M. Freeman, duly licensed by the State Board of Medical Examiners of California;

D. F. Callinan, duly licensed by said Board of Medical Examiners;

H. E. Vreeland, duly licensed by said Board of Medical Examiners;

C. K. Holsman, duly licensed by said Board of Medical Examiners; and affiant further states that

H. W. Baskette, who resides in the city of Chicago, state of Illinois, and who is in the city of Los Angeles temporarily, and who is a duly registered and licensed physician under the laws of the state of Illinois, has upon several occasions been called into consultation

(Signed) G. M. FREEMAN.

Subscribed and sworn to before me this 8th day of September, 1911.

(Seal)

(Signed) GEO. S. HUPP,

Notary Public in and for the County of Los Angeles,
State of California."

Filed Sept. 11, 1911. Board of Medical Examiners
of the state of California., secretary.

Testimony of James P. Webster.

"My name is James P. Webster. I am a newspaper man and connected with the Examiner for eight years and I am now assistant circulation manager. The two volumes that are there on the desk are bound files of the Los Angeles Examiner for the months of July and August, 1912. I took them from the regular files of

(Testimony of James P. Webster.)

the Los Angeles Examiner. The issues of that paper such as are bound in those two volumes were actually issued upon the dates of the papers that are found within the covers of those volumes, copies of the papers included within those two bound volumes were sent to subscribers through the United States mails. The general circulation extended over Southern California, Arizona, New Mexico, Southern Nevada and a portion of Western Texas."

Thereupon was introduced a stipulation signed by the defendants and approved by their counsel which admitted that the Los Angeles Examiner of date July 14th, 1912, contained an advertisement of the defendant Freeman and was placed in said paper by defendant Freeman and the advertisement of said defendant Freeman of that date, to wit, July 14th, 1912, was introduced in evidence under stipulation filed in this cause. Whereupon the following occurred:

"Now, if the court pleases, I desire to offer in evidence, having been properly identified as having gone through the mails, and being a regular bound volume of the circulated copies of the Examiner for August and July, 1912, these papers insofar as the same contain advertisements over the signature of Doctor Freeman, similar to the one introduced in evidence.

The Court: Any objection, gentlemen?

Mr. Stone: That is the one covered by the stipulation?

Mr. Moody: No, that is in. I am offering the others now for the months of July and August.

Mr. Stone: They are objected to as no foundation has been laid.

The Court: When you have shown one advertisement, what is the importance of—

Mr. Moody: To show that that was not the only one; that is the idea, if the court please; that these advertisements were a matter of regular course, and there was not but one isolated advertisement placed in. I have simply taken it during the time alleged in the indictment, the two bound volumes of the Examiner containing similar advertisements.

The Court: The objection will be overruled.

Mr. Stone: Does the record show our objection on the ground no foundation has been laid?

The Court: Well, the objection will be overruled.

Mr. Stone: Exception." *Exh. 3.*

Whereupon there was read to the jury by the assistant United States attorney the Government's Exhibit Number 2, purporting to be an advertisement of said Doctor Freeman published in the Los Angeles Examiner as follows:

"PLAINTIFF'S EXHIBIT NO. "2."

FACTS FOR MEN. By G. M. Freeman, M. D.
THE LEADING SPECIALIST.

(Picture Insert) I publish my true photograph, correct name, and personally conduct my office. I make this announcement so that you will know you consult a true specialist who sees and treats his patients personally. It is important that you should know the doctor who undertakes to treat you. I possess skill and experience acquired in such a way that no other

can share them, and should not be classed with "medical companies" or "medical institutes." Such companies or institutes have no license to practice medicine in any State. They are usually advertised with a portrait of a doctor whose identity or personality is indefinite as the legitimate specialist of the office. Hired substitutes, ordinary doctors with questionable ability, give consultation, examination and treatment.

A thorough investigation should be made by every ailing man as to the specialist he consults. Duty and destiny to self and those who depend upon you demand the best medical attention. I have the ability and can give you this service. I have always charged a very reasonable fee, so that my services may be obtained by any man who sincerely desires to be cured. I make no misleading statements, false promises or unbusinesslike propositions. I would like to have you for a patient if you will come to me on a strictly professional basis, accepting inducements that I offer, which are my ability, experience, time-saving treatment and cure of diseases of men.

MY ONE TREATMENT CURES. For Weak,

Diseased Men.

CURE TO STAY CURED.

YOUNG MEN: Have you, through indiscretions and abuse of Nature's laws, broken down your health? Is there a constant drain on your vitality? Your pimpled face, dark-circled eyes, stunted development and guilty, bashful manner proclaim your folly to all the world. and mar your success in business, pleasure or society. Don't despair. I can rid you of all these symptoms,

prepare anew for married life and make you one more a man among men.

MIDDLE-AGED MEN: You are reaping the penalty of neglected youthful sins. Dissipation, excesses, blood disease, etc., have ravaged your system and undermined your already weakened vitality. Weaknesses have developed into organic disease. You are prematurely old and not the man you should be. Your manly power is on the decline and will soon be lost. Awaken to your true condition. I can restore you to robust health, with physical, moral and manly powers complete.

NERVOUS DEBILITY: My cure for weak men removes all ill effects of former folly, checks every leak or drain of vigor, makes your nerves strong and steady; enriches your blood, invigorates the wasted pelvic organs, and, most important of all, restores the vital powers to the fullest degree. Avoid temporary stimulants. I guarantee a permanent cure.

VARICOCELE: I cure this affliction without pain or knife. Soreness, swelling and congestion of the dilated veins vanish quickly. Losses are checked. A healthy circulation of blood is re-established, the atrophied parts are developed, and the old-time feeling of warmth, vigor, and vitality speedily returns. Avoid dangerous operations. I can give you the quickest, safest and surest cure known to medical science.

SPECIFIC BLOOD POISON: The New German Remedy, "606" or Salvarsan, is truly scientific, and has done more to relieve sufferers from this disease than any other discovery of this or any other age. Salvarsan, or "606" as it is generally known, is so called as the result of the six hundred and sixth experiment

made by its inventor in order to perfect his formula. It will kill the so-called spirillic germ instantaneously. "606": Carrying out my plan of action all through life, I have been cautious regarding Prof. Ehrlich's discovery until such time as the medical profession on both sides of the Atlantic has become a unit regarding its use and its power to absolutely exterminate the scourge. It is my custom to keep abreast of the times in everything that is for the good of my patients. Accordingly, I have installed the most elaborate "606" laboratory (according to the German method), I believe, not only on the Pacific Coast, but in the whole United States.

In the majority of cases it is only necessary for the patient to remain under my direct personal care for a few hours, after which he can go to his hotel, business or home, with a feeling of relief such as sufferers from this disease never dream. I invite you, dear reader, to come and have a heart-to-heart talk with me. I assure you in advance of satisfactory results. My fee will not be one cent more than you are willing to pay for a complete cure. The bone pains, swelling, sore throat, ulcers and all other distressing symptoms disappear, never to return again. Shortly after you have received this treatment directly into the blood, we will have a Wasserman test made, or I will allow you to have the same made if you desire, in order that you may know absolutely and positively for all time that every vestige of the poison is entirely eliminated from your system.

(Picture Insert)

Giving a Patient SALVARSAN, "606" Professor

Ehrlich's German Remedy for Blood Poison. This is the Intravenous Method, Directly into the Blood, the Only Way it should Be Given.

Extract from letter of Professor Ehrlich:

. . . . Judging from all the reports received by me, it appears that the intravenous injection is to be preferred to all other modes of administration, as far as permanency of effect is concerned. Although I have to admit that this method of administration will prove an obstacle to the introduction of the remedy in general practice, on account of certain technical difficulties, I believe that the interests of the patient demand that only the most efficient form of treatment should be decided on.

. . . . I should feel much obliged to you if you will—as heretofore—assist me in this direction, and in the future employ as much as possible the intravenous mode for the administration of the remedy.

(Signed) P. EHRLICH.

Thomas A. Edison, the great “electrical wizard,” says: “The German Discovery is the most important achievement of the year 1911—and that most of us have the disease and do not know it.”

I guarantee a painless and safe cure, giving the Genuine German Remedy according to the great German Professor's latest instructions.

I CURE VARICOCELE, HYDROCELE, HERNIA, FISTULA, PILES AND STRICTURE IN FIVE DAYS.

No pain or severe operation, no detention from home or occupation.

I ALSO CURE ALL DISEASES OF MEN, in-

cluding WEAKNESS, Lost Vitality, Spermatorrhoea, Prostate and Bladder Trouble, Kidney and Urinary Diseases, recent and old, together with all complications arising therefrom. To the skeptical and discouraged I make this fair offer:

PAY AFTER I CURE YOU.

Any man who wants to be cured has no excuse for suffering another day. I don't care who has failed to cure you, consult me. I will advise you how you can be Cured free of any charge. Don't give up before consulting me.

Don't wait until nature gives way and the disease disorganizes organs and nerves. Now is the time to get new strength. Millions of men are wrecked yearly on the rocks of ignorance.

CONSULTATION AND EXAMINATION FREE.

Expert medical examination free, whether you take treatment or not. Free examination of urine and blood when necessary.

Hours: 9 A. M. to 8 P. M.; Sundays, 10 A. M. to 1 P. M.

HONEST AND TRUE—I follow the lead of no living human being. In my Specialty I stand supreme. Full credit allowed for all fees paid on unfinished or uncured cases undertaken by **WEAK** or **INCOMPETENT SPECIALISTS**.

Write me a full description of your symptoms and trouble, if unable to call. All dealings are confidential. Call or write today for Free Consultation.

DR. G. M. FREEMAN, 327½ So. Spring St.,
Los Angeles, Cal., Opposite Jeffries' Cafe."

That the bound volumes for said July and August, being about sixty in number, each contained an advertisement purporting to be that of the defendant Freeman and similar in many respects to the one above quoted. Thereupon there was introduced in evidence as Government's Exhibit Number 2-A the following stipulation:

"PLAINTIFF'S EXHIBIT NO. 2-A.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 903 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN *et al.*,

Defendants.

STIPULATION.

It is hereby stipulated by and between the United States of America and the defendants, giving the names of Gideon M. Freeman and Charles K. Holsman, that there was mailed two letters, one dated August 11, 1912, and the other December 16, 1912, and likewise a diagnosis sheet dated August 30, 1912, and all being mailed soon after their date to G. M. Freeman, which letters were signed Cicero Hickman, Deming, New Mexico, and which diagnosis sheet purported to be the diagnosis of said Cicero Hickman, and that there was mailed from Dr. G. M. Freeman's office in the city of Los Angeles, letters dated August 15, 1912, August 26, 1912, August 30, 1912, September

1, 1912, September 13, 1912, September 30, 1912, November 1, 1912, and December 17, 1912, which letters were addressed to Cicero Hickman, Deming, New Mexico, and which letters are in the files of this case in the possession of C. E. Webster, postal inspector at Los Angeles, California; and

It is further stipulated that all said letters and diagnosis sheets so mailed at Deming, New Mexico, to G. M. Freeman, Los Angeles, were received through the United States mails at the office of said G. M. Freeman in said city of Los Angeles; and

It is further stipulated that the person writing said letters was guided by the language contained in an advertisement circulated in the Los Angeles Examiner July 14, 1912, over the name of Dr. G. M. Freeman and other advertisements appearing in newspapers published and circulated in said city of Los Angeles; that letters dated August 24, 1912, and November 21, 1912, and diagnosis blank dated October 10, 1912, were mailed at Kingman, Arizona, and transmitted in the United States mails to the addressee thereof, to-wit, G. M. Freeman, Los Angeles, California, and were received at the office of said Dr. G. M. Freeman, which said letters and diagnosis sheet were signed "Claude L. Coon, Box 741, Kingman, Arizona," and that there was transmitted through the United States from the office of said Dr. G. M. Freeman in Los Angeles to said Claude L. Coon at said address, Box 741, Kingman, Arizona, letters dated August 29th, September 12th, September 26th, October 12th, October 28th, and November 25th, 1912, which said letters in this stipu-

lation mentioned as being mailed from the said office of said Dr. G. M. Freeman were all over the name of said G. M. Freeman, M. D., and were in reply or pursuance of the said letters so mailed from said above named post offices under the name of the said Cicero Hickman and the said Claude L. Coon.

That under date of October 10, 1912, there was sent through the United States mails from Kingman, Arizona, a liquid preparation consisting of cold tea, ammonia, salt and paste, with a specific gravity of 10.20, and that with the diagnosis blank of the said purported Cicero Hickman there was likewise mailed a like preparation and that said preparation were, with said other mail matter mentioned, received at the office of said Dr. G. M. Freeman, and the said defendants each for themselves admit the truth of the said statements contained in this stipulation, and will so admit the truth of said facts so stipulated upon the trial of the above entitled case.

It is further stipulated that like correspondence was carried on through the United States mails between a person signing letters under the name of Geo. Mertens at Madera, California, and Hamil Hall at Tooele, Utah, and Robert E. Judson, Yuma, Arizona, and that with letters sent by said respective persons through the United States mails from said respective post offices was enclosed diagnosis blanks, and at the same time each of them sent through said mails a like preparation as that above mentioned in this stipulation, and that all of said letters and said preparations were received at the said office of said Dr. Freeman, and that answers thereto were sent through the United States

mails from the said office of the said Dr. Freeman over the name of said G. M. Freeman, M. D.; and

It is stipulated and agreed that all of the letters and copies of the said diagnosis blanks mentioned in this stipulation may be introduced in evidence upon the trial of said case without other proof than the assurance of the said C. E. Webster to counsel for the defendants that the letters so introduced are the actual letters so sent through the mails, and that upon like assurance of the said C. E. Webster the copies of said letters so transmitted through the said mails and received at the office of said Dr. G. M. Freeman may be read into evidence, subject only, however, to the right of the defendant, and each of them, to object to the admission of such copies; and such original letters, upon the ground only of the incompetency of said original letters so sent from the office of said Dr. G. M. Freeman and the incompetency of the original letters so sent to the said G. M. Freeman.

(Signed) G. M. FREEMAN.

C. K. HOLSMAN.

M. G. GALLAHER,

Asst. U. S. Atty."

Thereupon it was stipulated between counsel for the government and counsel for the defendants that the letters referred to in said stipulation and to be afterwards introduced in evidence as the letters addressed to G. M. Freeman, Los Angeles, California, were each and all of them decoy letters, that is that none of the letters introduced in evidence on the trial of this cause as having been written to the defendants or either of

them were anything more than decoy letters prepared by post office inspectors, and that the replies thereto purported to come from the office of the defendant, G. M. Freeman, at Los Angeles, and the defendants objected to the said letters so written by said post office inspectors when the same were offered, upon the ground that the same were not competent in that there was no proof that the same were written by Dr. G. M. Freeman or that he authorized the same to be written and that said objections were overruled and that the defendants and each of them excepted.

Thereupon there was offered in evidence on behalf of the government the following exhibits:

“PLAINTIFF’S EXHIBIT NO. 3.

Kingman, Ariz.

Dear Doctor:

I have seen your advertisement and as I fear I may need treatment I am asking you to send me the free consultation blank.

Yours truly,

CLAUDE L. COON, Box 741.”

“PLAINTIFF’S EXHIBIT NO. 4.

“All communications strictly confidential.

Consultation and advice free in person or by mail.

Daily office hours: 9 a. m. to 8 p. m. Sundays:
10 to 1.

G. M. Freeman, M. D.

The Leading Specialist for Men.

327½ South Spring Street.

Largest and best equipped office in the west.

Confidential letters, moneys orders, drafts, etc., will reach me safely addressed to my secretary, A. C. Sims, 327½ S. Spring street, Los Angeles, Cal.

I confine my practice to the special, private, chronic and genito-urinary diseases of men.

Los Angeles, Cal., August 29, 1912.

G. A. Leonard.

Mr. Claude L. Corn,

Box 741, Kingman, Arizona.

My Dear Sir:—

As per your request of recent date, I enclose herewith a Symptom Blank, which I trust you will fill out and return to me. As soon as received, I will make a thorough study of your case and will tell you honestly and frankly what will be best for you to do.

Trusting I may hear from you by return mail, I am

Very faithfully yours,

FEW (Signed) G. M. FREEMAN, M. D.

(Envelope accompanying above, addressed to: "Mr. Claude L. Corn, Kingman, Arizona, Box 741. Post marked Los Angeles, Cal. Aug. 29 5:30 P. M. 1912.")

"PLAINTIFF'S EXHIBIT NO. 5.

"SELF-EXAMINATION BLANK FOR MEN.

If you wish your correspondence to be private, use address enclosed herewith.

Strictly confidential. I never publish, sell or give the names of my patients to anyone.

GENERAL QUESTIONS TO BE ANSWERED IN ALL CASES.

1. State your age 22 Height 5-9 Weight 180
2. Are you married or single? Single.
3. What is your occupation? Cowboy.

4. Are you employed now? Yes.
 5. How many hours daily? About 10.
 6. Does your work require heavy lifting or straining? Riding.
 7. How long have you been employed in your present position? As long as I remember.
 8. What appears to have been the cause of your disease? Have no idea.
 9. How long have you been sick? About 8 Mon.
 10. Can you visit me at my office if I think it necessary? No. When? to far away.
 11. Have you been treated by a Specialist? No. If so, by whom?
-

THOSE WHO SUFFER FROM THE BAD EFFECTS OF Seminal Weakness, Spermatorrhoea, "Night Losses" or Impotency, Sexual Debility, Loss of Sexual Power, etc.

ARE REQUESTED TO ANSWER THE FOLLOWING.

Have your privates become wasted or small? No.

Have you practiced masturbation or self-abuse? No.

If so, when did you commence it?

Have you quit the habit? If so, how long ago?

About how many times a month did you indulge in self-abuse?

Do you lose semen with your urine? (examine carefully) Know.

Do you have emissions of semen at night, with or without dreams? Yes.

About how many times a month do you have emissions? 1 or 2.

Do you lose semen during the movements of the bowels? Can't tell.

Do you lose semen after passing water? Don't think so.

Are the emissions (if any) attended by erections? Yes.

Does the semen ever pass from you during the day, when you have amorous thoughts, or when in company with women? No.

Are the seminal discharges (during sexual intercourse) too quick? No just right.

Have you ever had gonorrhoea or clap? No.

Have you ever had syphilis? No.

Is there any burning in the water passage after urinating? No.

Is there any stricture (obstruction in the water passage? Don't know.

What is the state of your bowels? Pretty regular.

Do you have pains in the region of your kidneys? No.

Is your back weak? No.

Do you seem to have a weakness in the legs? No.

Is your urine scanty and discharged with difficulty? No.

Is it high colored and offensive? No.

When cold, is it thick and milky looking? No.

Is there a deposit (like brick dust) in the bottom of the chamber? No.

Is there any varicocele? (in this disease the testicles will feel like a bunch of cords) No.

Are you so weak or debilitated as to be unfit for business? No.

Are you wakeful and restless at night? No.

Are you troubled with rushes of blood to the head, with dizziness? No.

Have you a ringing in your ears? No.

Have you a dimness of vision, with spots appearing before the eyes? No.

Is your memory bad? No.

Are your eyes in any way affected? No.

Is your stomach weak and digestion bad? No.

Is there a loss of sexual desire? No. Or power? No.

Are the erections weak? No.

Have you been addicted to drinking alcoholic liquors or using tobacco? Not enough to hurt.

Is your mind occupied with thoughts or your disease? A little.

Are you subject to despondency or gloomy feelings? No.

Have you ever thought of self-destruction? No.

Did any doctor ever treat you for Prostatorrhoea, complication Seminal Weakness? No.

QUESTIONS TO BE ANSWERED IN CASE OF CLAP, OR
ACUTE GONORRHOEA.

How long since you had impure connection?

Is there burning, smarting or scalding sensation in the water passages? While urinating or just after?

Are the parts swollen, inflamed, tender or red?

Do you have a discharge from the water passage? If so state color . . quantity . . . and time of appearance, etc.

Do you have chordee—painful erections?

Is either testicle swollen or painful?

Have you had Gonorrhoea before...if so, was it hard to cure? N. B. State all you can about it.....

QUESTIONS TO BE ANSWERED IN CASES OF GLEET, OR
CHRONIC GONORRHOEA AND STRICTURE.

How long has it been since you first had Gonorrhoea?.....and why was it not cured?

Have you been treated for gleet?

And how long did you continue it?

Do you have a discharge?

Is it copious, or only a few drops?

What is its color and nature?

Is there any burning or uneasiness in making water or just after?

Is the stream of water natural? or is it diminished in size?...does it divide or twist as it comes out?

When done urinating, is there a dribbling or leaking for a time?

QUESTIONS TO BE ANSWERED IN CASES OF SYPHILIS,
OR BLOOD POISON.

How long since you were exposed?

Is there an itching or burning sensation on the privates?

Are there any red spots, pimples, blisters or little sores on the privates?

Are there any sores in mouth or throat?

Any eruptions or sores on body?

Is the hair falling out?

Have you pains in your bones?

Have you ever taken mercury?

Can you get the foreskin backwards and forwards over the penis?

Is there an inflammation, swelling or soreness of the testicles?

Is there swelling or lumps in the groins? Are they tender?

With a lead pencil carefully answer all of the above questions touching on your disease. Fill out and mail the blank, and send me by express, charges prepaid, a small bottle (2-oz.) of your urine (the first you pass in the morning), for analysis, then I can treat you as well as if you were here, and nothing will be left undone, on my part, to restore you to full vigor and health.

Write on the other side any particulars you think I should know.

Sign your name and address here:

Dated October 10, 1912.

Name Claude L. Coon.

P. O. Address, Kingman, B. 741.

State Ariz.

Town in which express office is located. . Kingman.

In what paper did you see my notice?

Los Angeles Examiner.

OVER."

(The following appears on the back: "Dear Doctor I am also sending you a sample of my urin. I would have sent it sooner but couldn't get the right thing to send it in. Please let me know what is the matter with me. I am worried about my dreaming of and don't know what to make of it.

(Signed) CLAUDE L. COON.'"

Thereupon there was offered in evidence several other letters addressed to said defendant G. M. Freeman and being decoy letters as aforesaid and purported replies thereto and symptom blanks accompanying said replies, each and all of the same character and tenor as the aforesaid exhibit; and there was also introduced in evidence under said stipulation two bottles containing a mixture of tea, ammonia, library paste and salt, and no other or further evidence as to who sent out said letters and symptom blanks from Dr. Freeman's office was offered, the letters so sent out from his said office porting to reply to said decoy letters being signed by rubber stamp. It was also stipulated that the symptom blanks referred to show the condition of a normal man.

Testimony of Doctor Frank L. Cunningham.

"My name is Frank L. Cunningham. I am an osteopathic physician. Graduated here in Los Angeles in 1906. I have treated a few cases of gonorrhoea and am fairly familiar with them. I have not treated syphilis." Thereupon the following proceedings took place while the said witness was on the stand, after objection had theretofore been made to a similar question:

"Q. By Mr. Palmer: I will ask you doctor, whether or not, in your opinion, a physician can properly and successfully diagnose diseases of men, such as gonorrhoea and spermatorrhoea, by mail, without having seen the patient?

Mr. Stone: The same objection.

Mr. Hupp: To that we object upon the ground that

(Testimony of Doctor Frank L. Cunningham.)

the proper foundation has not been laid, and the witness has not qualified as an expert; that by his own testimony he belongs to a school that is not permitted under the law to administer medicines.

Q. By the Court: You say you have treated gonorrhoea?

A. I have, yes, sir.

Q. Have you treated spermatorrhoea?

A. I never have treated spermatorrhoea.

Q. Have you ever diagnosed such cases?

A. Yes, sir.

Q. You are familiar with the diagnosis of gonorrhoea?

A. Yes, sir.

The Court: I will overrule the objection.

Mr. Stone: Exception. Ex. 5.

Mr. Hupp: Exception.

The Court: You may answer the question.

A. I don't think it can be successfully treated by mail, or by correspondence.

The Court: Not treated,—diagnosed.

A. Diagnosed,—no, sir, it cannot.

Mr. Palmer: Q. Are you a practicing physician, a medical physician also?

A. No, sir, I am not."

"I will say as an osteopathic physician that a patient could not be successfully treated by sending medicines or other correspondence through the mail.

I have perhaps treated twenty cases of gonorrhoea in my practice of ten years. One of the best known treatments is the water treatment, by which I mean

(Testimony of Doctor Frank L. Cunningham.)

putting the patient to bed and flushing the system by an absolute treatment of water, free from any diet for a few days, by simply putting the patient to bed and giving him a large amount of water to drink. One cannot tell whether there is a case of gonorrhea unless he has a report from the laboratory, that is it could not be diagnosed properly. I have also used bismuthol by injection a couple of times a day. No one can positively say that gonorrhea is curable, at least it is temporarily checked. I treated some of these patients as long as eight or nine years ago. I don't know of any of them coming back. When I stated that a patient could not be successfully treated by mail I meant that if the doctor had a correct diagnosis of his case, knew what was the matter with him it would then be a question, a doubtful one, in fact the opinions of physicians on the matters I have testified to differ very greatly among the profession. I am not an M. D. I am a graduate of an osteopathic school. I put the letters "D. O." after my name."

Testimony of Dr. Charles H. Whitman.

"My name is Charles H. Whitman. I am a physician and surgeon. I am medical director of the public charities of the county of Los Angeles, principally at the county hospital. I have charge of all the professional services there as also of all the other county institutions. In other words I am in charge of the medical departments of the county hospital and have been for about eight years and have been practicing medicine for over thirty years. I am familiar with the

(Testimony of Dr. Charles H. Whitman.)

diagnosis of syphilis and gonorrhea and spermatorrhea and gleet and the general diseases of the genito-urinary class. Some people could not be expected to diagnose these diseases correctly on a symptom blank furnished him by a professional man. (Here the witness examines United States exhibit, being one of the symptom blanks referred to.)

Thereupon the following proceedings occurred.

“Q. Now, will you read the questions there, doctor, and tell the jury whether or not a patient can answer those questions and correctly tell whether or not he had clap or acute gonorrhea?

Mr. Stone: That is objected to as incompetent, irrelevant and immaterial. It is shown by the doctor's testimony, Your Honor, on direct examination, that some patients could tell and some could not. Now there is no way to tell, unless he had the patient before him and knew the character of the man.

Mr. Moody: I think Mr. Stone is in error.

The Court: That must depend upon his opinion about it, Mr. Stone. I will overrule your objection.

Mr. Stone: Exception.” Ex. 6.

While in that paragraph (referring to the symptom blank) many of those things, of course, the patient would be able to tell but he would not be able to tell whether he had clap or acute gonorrhea and on reading the second list as to gleet or chronic gonorrhea or stricture or of the third list as to syphilis or blood poison I will answer your question as to the patient's ability to decide. It is not possible to diagnose gonorrhea without the use of a microscope. The positive

(Testimony of Dr. Charles H. Whitman.)

diagnosis of syphilis is the blood test called the Wasserman test. The ordinary layman by self-examination cannot tell whether or not he has gonorrhea or syphilis; that is the ordinary layman who is not familiar with the microscope. The only way to distinguish these diseases is the microscope for the gonorrhea and the Wasserman test for the syphilis,—the two diseases are different.

Thereupon the following occurred:

“Q. Now doctor, would you say from your experience in treating patients that it would be possible to successfully treat patients through the mails upon questions answered by them, without personal contact with the patient in the diseases, the so-called genito-urinary diseases?

Mr. Stone: That is objected to as irrelevant, incompetent and immaterial, and not a proper question for expert testimony.

The Court: The objection will be overruled.

Mr. Stone: Exception.” Ex. 7.

A doctor who reads the patient's description of what he had could not tell what the patient had without a personal examination. I have had considerable experience in over thirty years in treating syphilis. I remember the incident in which a number of patients in the county hospital were treated for syphilis, six or seven at one time, and it was discovered that there was an invisible fracture in one of the small containers, the ampoules, and that it had decomposed, and that the medicine itself had decomposed and was poisonous, and that was the cause of the unfortunate occurrence by

(Testimony of Dr. Charles H. Whitman.)

which seven or eight of the patients died. They had spinal syphilis. At that time I was superintendent of the county hospital where these treatments were given and the men died. The treatment was administered by the pathologist, that is, under his direction, by assistants at the county hospital. It was a well recognized procedure, that has been used in this city and nearly all over the world. The nature of the remedies used is left to the attending staff which I appointed. They did not die from the manner of the treatment. I explained to you that the medicine had become deteriorated by the entrance of oxygen mixed with nitrogen and it had decomposed the remedy. To put it in simple language so that we can all understand it, they died as a result of the treatment. I do not know that all the better schools of physicians differ as to the manner and method of treating syphilis. I can't answer for everybody. The use of "606" is not entirely recognized as the best remedy known to the medical profession for the treatment of these diseases. I can say frankly it is not a cure. Some doctors recognize "606" as one of the best known remedies for that disease and some do not. I would not consider the water cure a specific remedy for gonorrhea, that is the use of water by which the patient can be put to bed and drink all the cold water that he can drink. I do not know of any remedy known to mankind that will absolutely cure a case of gonorrhea in a week's time and I do not believe there is such a remedy. I believe there is an absolute cure for gonorrhea. I think six weeks would be the shortest time possible."

Testimony of C. E. Webster.

“My name is C. E. Webster. I am postoffice inspector located in Los Angeles and have been for five years at Los Angeles and was one of the inspectors who examined and worked this case up. Prior to the return of the indictment herein I had a conversation with the defendant Freeman at the corner of Third and Broadway about the first part of 1914. There was present at the time, Doctor Freeman, Inspector Ranger and myself. I showed Doctor Freeman one or two of the letters that have been introduced in evidence here and asked him particularly regarding the signature that appeared thereon (which is conceded in this case to be a rubber stamp fac-simile of his signature). The letters were either addressed to Cicero Hickman or Claude L. Coon, and they were the letters that bore the rubber stamp, “G. M. Freeman, M. D.” We asked Doctor Freeman if that was his fac-simile and he said it was and he was asked how he happened to be connected with the business that was represented by those letters and he said he was employed by Dr. Holsman, Giles and Joslyn to conduct the business, and that he was working on a salary, and received a percentage for allowing his name to be used in carrying on the business, and that he furnished a rubber stamp facsimile of his signature to Mr. Sims to be used in the correspondence, and that he received a percentage in addition to his regular salary for the business of the office. He said Mr. Sims was not a physician and was brought there to take care of the mail order business and that to save his, Dr. Freeman's time, in personally signing

(Testimony of C. E. Webster.)

the letters, his rubber stamp signature was furnished by him. He said that he received a percentage of all the business that came to the office in addition to his regular salary. Those letters came into my possession in February, 1913. I did not know about those letters in September or October, 1912. Those decoy letters were written by Inspector Woltz, Inspector Leonard and Inspector Honvery, operating from Washington, D. C. Dr. Freeman answered all questions fully and frankly except that he said he could not give all the details on account of the magnitude of the business. He offered to turn over to me all of his correspondence so I could look through it in regard to the business he is now conducting, but not of the business conducted at the time these letters were sent. I did not go to 327½ South Spring street and I do not know whether they were running there in 1913 or not. He told me that he had given instructions that no cases should be taken by mail and indicated that that was a short time before he left the office at 327½ S. Spring street. I would say that it was between January first and April 14th, 1914, that I went to Doctor Freeman's office. I did not make any inquiry about the correspondence of the office between the date of the decoy letters and the time I was there. The particular thing I had in mind was the decoy letters. I saw *bona fide* letters written from that office, that is, letters that were not decoy letters and I have them in my files. I have one and possibly more. I got that one from the party to whom it was addressed. Dr. Freeman told me at the time I showed him the letters with the rubber stamp that he

(Testimony of C. E. Webster.)

never saw these symptom blanks before nor the letters that purport to have been received or sent out from his office. He said that all mail order business was handled by Mr. Sims and that he knew nothing about these particular decoy letters and had nothing whatever to do with them. I knew that some fake urine had been sent in to try to catch him, but I did not ask him about this. I did not ask him anything about the Wasserman test or whether they had used it or not."

Whereupon the following proceedings occurred:

"Q. How many people have you, in your investigation which you have testified about, talked to personally or written to in regard to the treatment received from that office?

Mr. Moody: We object to that as incompetent, irrelevant and immaterial and not cross-examination.

The Court: I don't see the materiality of that.

Mr. Stone: Well, they are charged with defrauding various people, and they introduced the Examiner to show the extent of its circulation, and the indictment charges they were intending to defraud everybody anywhere and everybody they could. Here is a post office inspector who went there to make this investigation, Your Honor, and the question is bearing on what he found there, and so on, and what he found in his investigation as to the extent of anybody that claimed to be defrauded.

The Court: Well, I will sustain the objection. I don't think the conduct of this witness is material to this case.

Mr. Stone: Exception. That is all, Your Honor."
Ex. 8.

Testimony of C. S. Ranger.

My name is C. S. Ranger. I am postoffice inspector. I am acquainted with the defendant, G. M. Freeman. I had a conversation with him relative to this case I think early in 1914 in the presence of Inspector Webster and at that time Dr. Freeman's office was at 3rd and Broadway. We asked him about his connection with the office at 327½ South Spring which was run under his name and he *he* stated he was hired to run it by Dr. Holsman, Giles and Joslyn, and that he received a salary and a commission. We submitted to him some letters we had signed with a rubber stamp signature of his name and asked him if it was what it purported to be, his signature, and he said it was. He further stated that this rubber stamp was authorized by him for the use of one Sims, who conducted the correspondence. He said he could not recall at that time the decoy letters as the correspondence was handled by Mr. Sims. I recall that I showed him the decoy letters and he did not appear to know anything about the letters—he did not appear to be able to identify that particular correspondence. He said he was unable to recall the particular letter we showed him or any of the decoy letters we showed him. We inquired mostly in regard to the Coon letters. We asked what diseases were treated by correspondence and what not, and he replied that hydrocele, varicocele and circumcision were not treated by correspondence. We made no inquiry as to whether or not he had any correspondence between the date of the decoy letters and the time we were there. We simply showed him

(Testimony of C. S. Ranger.)

the decoy letters and the replies that bore his rubber stamp signature. I knew at the time that the letters to which the rubber stamp was signed were replies to decoy letters. We only showed him letters which bore his rubber stamp signature. I saw no *bona fide* letters that were sent to the office. I never at any time saw Dr. Holsman at the office or about the office. He told me that Mr. Sims handled the mail business. He told me that he was instructed not to take cases by mail; that Mr. Sims had been instructed not to take cases by mail but whether it was subsequent or prior to these letters I do not remember. He did not appear to be familiar with the correspondence I showed him. We had about forty minutes' conversation with him and this is the substance of all he said.

Testimony of Dr. Wirt B. Dakin.

My name is Wirt B. Dakin. I am a physician and surgeon engaged in the private practice in Los Angeles and am instructor of genito-urinary surgery at the University of Southern California, and have been attending the county hospital as a surgeon in genito-urinary diseases for two and a half years and am familiar with the diagnosis of genito-urinary diseases. I would say that a layman could not successfully diagnose genito-urinary diseases that he had and could not tell whether it was syphilis or not, neither could he as to gonorrhea absolutely, nor could he as to gleet absolutely, the way to tell is by the microscope and culture growths; then there are blood tests but more attention is placed on the microscope. In the case of syphilis it

(Testimony of Dr. Wirt B. Dakin.)

requires a personal examination and Wasserman test, which is the recognized test.

Thereupon the following questions were asked and answers given thereto.

“Q. Now, basing your answer upon your experience in the treatment of these diseases, syphilis and gonorrhea, would you say that these diseases could or could not be successfully treated through the mails upon questions asked by yourself and answered by the patients through the mails?”

Mr. Stone: That is objected to as irrelevant, incompetent and immaterial, and not a proper subject of expert testimony.

The Court: The objection will be overruled.

Mr. Stone: Exception.” Ex. 9.

I do not absolutely know of any genito-urinary disease that can be successfully treated by correspondence without personal contact with the patient. You might make a hit and miss game of it, you might hit it right—you are taking a chance always. The medical science is not always an absolute certainty. I belong to the allopathic school. There is an absolute cure for gonorrhea and there is also in the early stages of syphilis. Syphilis in its first stages probably can be cured. The best recognized treatment for syphilis is mercury and iodine treatment plus the “606” or Salvarsan treatment. I am not certain and no one else is certain that they have absolutely cured syphilis and this would apply to the fifteen hundred patients I have treated.

Whereupon at the close of this evidence the government rested its case.

EVIDENCE OF THE DEFENDANTS.**Testimony of Gideon M. Freeman.**

My name is Gideon M. Freeman. I am a physician and surgeon duly licensed to practice in the state of California. I graduated in 1903 from the medical department of the Leland Stanford University and since that time I have specialized practically all the time in genito-urinary conditions and diseases. I know the defendants Drs. Holsman, Giles and Joslyn and Mr. Sims. I was formerly connected with the office at 327½ South Spring street in 1912 and saw all the cases that called at the office. I worked there on a salary for Drs. Joslyn, Holsman and Giles. I was first employed by Dr. Joslyn at Third and Spring. When I first came to Los Angeles Dr. Joslyn sent me from San Francisco to catalog a museum at Third and Spring streets, where the Washington Building now stands, after which he offered me a position as treatment man in the office and finally I took charge of the office. He hired a man to attend to the mail and there was no letters or cases supposed to be taken by mail and I had a definite understanding with Dr. Joslyn that no cases would be taken by mail without a personal visit to the office and Dr. Holsman told me to continue the same policy that had been in force. I did not do or attend to any of the correspondence. In June, 1912, the office moved to 327½ South Spring street and each day we would treat in the neighborhood of between forty and sixty patients a day in the office. There were other physicians in the office. The office was equipped with an operating room with all the equipment that a man

(Testimony of Gideon M. Freeman.)

could use in a regular operating room, in brief the sterilizers and tables and all the instruments and treatment room, one that had all the scissors and knives and so forth, for the minor work; another room where we gave consultations. Then there was an electrical apparatus in booths, and there were armatures in two or three more booths, a static machines, an X-ray, and different electric currents for the different machines.

Thereupon the following questions were asked and answers made thereto:

“Q. Compared with the average office, how was that office equipped, for the treatment of those diseases?”

Mr. Moody: I object to that as incompetent, irrelevant and immaterial and calling for the conclusion of the witness, and asking for a comparison with other offices.

The Court: Read the question.

(Question read.)

Mr. Moody: He stated what was in there. We object to the comparison.

The Court: Well, objection sustained.”

Mr. Stone: To which the defendants, and each of them, except. Ex. 10.

I have treated between thirty-five and forty-five hundred cases of syphilis. The treatment I used for that disease was “606” and “914” with the mercury and iodine and that is the only treatment we know of. I would say that eighty or eighty-five per cent of our business was gonorrhea and syphilis and fifty per cent of that was gonorrhea. The first time I saw these

(Testimony of Gideon M. Freeman.)

symptom blanks referred to was after the office was moved to 327½ South Spring street in June, 1912. I had never seen them before. Those were never used in the business after moving to this number. I have never sent out to any patient or prospective patient any of the symptom blanks and no one in the office did so in my knowledge. Mr. Sims was manager of the office and took care of the cash and of the books and opened the mail and attended to the drug store. To begin with instructions were given by Dr. Joslyn that no cases should be taken by mail and that order was never changed. I do not know of any of these cases or these letters in evidence, I mean the decoy letters. The postman left the mail on Mr. Sims' counter, next to his desk, and he always opened the mail and if there was a new inquiry the patient was supposed to be asked to call at the office and if the patient was not getting along as he should be he would refer it to the doctor who treated the patient and ask his advice as to a change in the medicine and the doctor would give orders accordingly. I had nothing to do with any letters of any kind. I was simply there to treat the patients. Mr. Sims took charge of the money. I never saw on the books the name of any patient that was not a patient being treated at the office. I had a microscope in my room and all the stains that are used with it. And a urinary test both in my room and in the drug store, two separate outfits. I left the employ of Drs. Holsman, Giles and Joslyn the first week in April, 1913, and opened an office at Third and Broadway for the treatment of the diseases of men and followed up

(Testimony of Gideon M. Freeman.)

exactly the same plan as to the mail and conduct of the mail matters. I do not know where the cash book is. I looked at it every day to see how much—how things were running. I never at any time knew anything about the decoy letters until the postoffice inspectors called on me. I never knew anything about the purported replies that had been sent out and never saw them and when the postoffice inspectors called on me they did not ask me anything about anything except the decoy letters and the purported replies thereto. I received the same instructions from Dr. Holsman about taking cases by mail as I had received from Dr. Joslyn, towit, that no cases should be taken by mail. Dr. Holsman was in the office in July of 1912, about three weeks, and between July & Dec., 1912, but I don't know when. I preserved and have here the correspondence for the year 1913.

Whereupon the following questions were asked and answers made thereto:

“Q. Did you preserve, and have you your correspondence for the year 1913?

A. I have, yes.

Mr. Stone: Do you want to examine this?

Mr. Moody: Is this correspondence of the office at Third and Broadway?

Mr. Stone: Yes.

Mr. Moody: No, I don't want to examine it. It has nothing to do with this case.

Mr. Stone: Q. I show you here, doctor, a number of letters and replies in May, 1913, relating to the business of the office. Will you kindly examine that ex-

(Testimony of Gideon M. Freeman.)

hibit for the month of May, 1913, and state whether or not those are the original letters received at the office, and copies of replies given by you in regard to any business of the office or the treatment of any patient?

Mr. Moody: Is this the office at Third and Broadway?

Mr. Stone: That is for the witness to say, where it is. It is immaterial where it was. The conspiracy is alleged to be January 1st, 1912, and from that time on, continuous, Your Honor.

Mr. Moody: During the times mentioned in the indictment.

The Court: Well, this question, Mr. Moody, is preliminary. Haven't you examined those documents?

A. Yes, sir, I know them.

The Court: Well, you can answer the question then.

A. Yes, sir, these are parts of my records.

Q. By Mr. Stone: That is for that month; is that correct?

A. Yes, sir.

Mr. Stone: We offer those in evidence, if Your Honor please.

Mr. Moody: To that we object, on the ground they are incompetent, irrelevant and immaterial, and do not go to prove or disprove any issue in this case, inasmuch as these are from the office of Dr. Freeman, which he has testified he was running alone, separate and apart from the other defendants, separate and apart from the place at which the indictment alleges the conspiracy was formed and carried on, and therefore they are in-

competent, irrelevant and immaterial.

Mr. Stone: I want to be heard further on that.

The Court: I will hear from you, Mr. Stone.

Mr. Stone: Now, if Your Honor please, our position is this: That in this case, up to this time, here are men associated in this particular business. They have been charged here with conspiracy, or a scheme or conspiracy to violate a certain provision of the federal code, that is, section 215. That is, a device or scheme to defraud by use of the mails. That has been emphasized by the counsel for the government time and time again,—by the use of the mails. Now, the only thing that appears in evidence up to this time are some decoy letters, that were admittedly false on their face, admittedly did not state the true facts, that were sent to this office, and to which certain replies had been made. These decoy letters are dated along about September and October, 1912. Now, it is attempted by these decoy letters to show that these men were engaged in a criminal conspiracy in the use of the United States mails. Now, there is no more definite and certain way to tell whether or not a man is engaged in a criminal conspiracy in the use of the mails than by the production of the correspondence which he actually had, with his *bona fide* patients, or people he was dealing with. In other words, can it be said that the defendant are to be put upon this trial, and confronted simply with decoy letters, which are themselves admittedly false, and answers which were sent out under circumstances of this kind, and then they are precluded from showing the entire correspondence over the time, the period in which they say the criminal conspiracy

existed. Any business man, in any business in this city, if he was charged with a conspiracy in the use of the mails in his merchandise, or anything else, there is nothing that would show his intention or the conduct of his business more certainly and generally than his actual correspondence with people with whom he was dealing. It is our contention, and I never heard it disputed in this court before, that in a conspiracy charge for the use of the mails, that the letters actually written and sent pertaining to the use of the mails over the times they say the conspiracy existed, should be admitted in evidence. I never have seen the objection made before, and I have prosecuted numbers of cases in this court, if Your Honor please, and I have never raised the objection, or seen it raised, or heard it questioned that it could not be done, as bearing on the man's intent in the use of the mails.

The Court: Well, Mr. Stone, what difference does it make how many honest letters he wrote, if he wrote one dishonest letter? I don't see how it makes any difference.

Mr. Stone: It makes this difference, if Your Honor please: The inquiry here is whether or not they were engaged in a criminal conspiracy. Can it be stated that they can pick out a few decoy letters that were sent to them, and to which answers have been made, without their knowledge, as the evidence appears here, and then all the letters pertaining to their business, showing they were doing an honest business, can be cut out? That is not the law, Your Honor.

The Court: I don't understand your claim these are

the letters of the people alleged in the conspiracy,—the letters of this one witness.

Mr. Stone: No, they have introduced the replies. Now, we offer to show the letters that were actually sent from their office, relating to their business.

The Court: To these particular correspondents?

Mr. Stone: Not to these particular correspondents, Your Honor. It is a very important question in this case, and I will state to Your Honor I am satisfied of my position about it. I may be wrong but it is either a grave error to refuse the admission of these letters, or it is not error at all.

The Court: As I understand you, Mr. Stone, these letters were written by this witness to patients of his?

Mr. Stone: I will correct Your Honor in this, these letters are letters that he received from different people with whom he was dealing, and copies of his replies.

The Court: When he was in the office.

Mr. Stone: Yes, sir.

The Court: Under the employment of Holsman?

Mr. Stone: Well, while he was in the office. His name is signed to them.

The Court: I say, while he was in the employment of Holsman?

Mr. Stone: Yes, sir, while he was in the office anyway. It does not make any difference whose employment he was in.

The Court: Well, I think it does make a difference in any event.

Mr. Stone: Your Honor, this indictment charges that at the times these letters are dated—we have over 150 letters, which cover the entire correspondence of

this office from the time these decoy letters were sent up to the time these postoffice inspectors came to investigate. Now, we are not offering letters after the post office inspectors investigated there, because they would say those letters were made for the purpose of avoiding prosecution. But we are offering letters which existed and show the business of the office between the time the decoy letters were sent there and the time they were questioned by government officials, at a time when there was no reason for fabricating matter, but was their correspondence. The indictment charges they conspired to defraud various people by the use of the mails, and we want to show by every man that had correspondence with him that he never intended to defraud him; that the letters we received from those people, and every letter sent to them in every instance stated they must come to the office for examination, in contravention of the things alleged in the indictment.

The Court: It seems to me, Mr. Stone, they are self-serving declarations and not admissible.

Mr. Stone: Exception. We want to make the offer for the purpose of the record. Ex. 11.

The Court: Yes, have them marked for identification.

Mr. Stone: Yes. We offer first, if Your Honor please, we might offer them as one exhibit, a series of letters and copies received from patients, people with whom these defendants were dealing in May, 1913, as Defendant's Exhibit No. 1, there being about 30 or 40 letters.

The Court: Are they fastened together?

Mr. Stone: I think so, Your Honor.

The Court: Mark that Exhibit 1.

Mr. Stone: This is No. 1, being the entire correspondence of the office for that month, relating to the treatment of any disease by the use of the mails.

Mr. Moody: While Your Honor has sustained the objection, and while counsel has entered an exception, in order that the record may be clear, I will interpose an objection upon another ground, that it is privileged correspondence, and the privilege is not waived by the addressee or the writer of the letters.

The Court: That objection is well taken, too, I should think.

Mr. Stone: I don't think so, under the facts in this case.

The Court: Well, proceed, Mr. Stone.

Mr. Stone: We made no objection to the privilege of the post officer inspectors."

(The letters and copies of letters so offered, in evidence, are in the words and figures following, to-wit:)

Goldfield, April 27, 1913.

(Sent Varix letter Apr 30/13.)

Mr. H. J. Tillotson, M. D.

I see your ad. in Los Angeles examiner for to cure varicoccele so I though I would write to you for A book about it so I can explain my case to you. I have a diseases in my penes about 4 years and I tryed A lot of doctors but they failed to cure me.

Address Wm. Grout, Goldfield, Nevada."

"Goldfield May 15, 1913.

Mr. D. R. G. M. Freeman,

I see where you have taken up D. R. H. J. Tillotson

place of business so I would like to now what you can do for me. I explained my case as good as I new how so let me now if you can cure me and how much is you price.

Address Wm. Grout, Goldfield, Nevada."

"May 16th, 1913. NEW

Mr. Wm. Grout,
Goldfield, Nev.

My dear Sir:—

I have your favor of the 15th inst and have noted carefully your consultation letter and the description of your trouble which is Gleet; if you can come in to my office for a few visits I assure you that I can fix you up in a number one shape in a very short time, but I have no method of "mail order" treatment and your presence here for a short time under my personal care and attention will be absolutely necessary.

As I have none of the little booklets as used by Dr. Tillotson I am returning to you herewith the 12c in postage you sent me. Trusting that you will be able to come in to my office for treatment soon and assuring you of my best care and attention, I am,

Very respectfully yours,

GMF/CBT

No. 1 Follow up—6/13/13."

July 15, 1913.

Mr. William Grout,
Goldfield, Nevada.

Dear Sir:

I have had no reply to my two letters to you and am wondering how you have been getting along.

As I wrote in a former letter, it would be much bet-

ter if you could come in here and see me, if you could only stay a few days. I would like at least to have some word from you as to your intentions, so that I may know what to do with my record of your case.

With my best wishes,

Very respectfully yours,

GMF/CBT

"Goldfield, July 23, 1913.

Mr. G. M. Freeman, M. D.

In reply to your letter I received A few days ago I will now say that I cant go to Los Angeles under any conditions respectfully yours,

WM GROUT, Goldfield, Nev."

"NEW Coalinga, Cal. 6-8-13.

Dr. Freeman: Sir:

You said you could give me treatment for \$7 a month and it would take about 3 months how about sending me three month treatment and I send you \$7, Seven dolars and if you give a satisfactory cure in 3 months i can send you some more and if your treetment does no good i will just Be stung for seven dolars and you will Be seven dolars to the good so awaiting your reply i am,

A. S. COLE,
Coalinga, Cal."

c/o Traders Oil Co.

"May 9th, 1913.

Mr. A. S. Cole,

c/o Traders Oil Co., Coalinga, Calif.

My dear Sir:

I have your favor of the 8th inst. regarding a fee I made you for treatment. Your arrangement would work out all right Mr. Cole if I had any "mail order" method of treatments, but it will be necessary for you to come in to my office for a few days at least so that I can have you under my personal attention and then we might give you treatments enough to last a few weeks if it is not convenient for you to stay here; I assure you that there is no doubt of my ability to bring about satisfactory results in your case, and I shall be glad to extend to you my best personal and professional services.

You will please note my change of address; I have a well appointed suite of rooms in the Rindge Bldg., cor. 3rd and Broadway, equiped with all the modern and scientific appliances for the treatment of the diseases of my specialty, and shall be glad to see you at an early date

With my best wishes, I am

very respectfully yours,"

GMF/CBT

"Monrovia, Cal. 5-7-13.

Dr. G. M. Freeman,

I would be please to have you send me particulars regarding the animal serum treatment you advertise in Examiner. I have had a long sickness and feel I need such a treatment. Please advise me as to number of

treatments and cost of same and if within my means, I will call and see you when in Los Angeles.

Respectfully yours,

A. B. SPENCER,

Monrovia, Cal. Gen. Del.

“NEW

May 9th, 1913.

Mr. A. B. Spencer,

Gen. Del., Monrovia, Cal.

My Dear Sir:—

I have your valued favor of the 7th inst. and am much interested in your case; however, before any Physician can prescribe for or give an honest opinion of any case he must have a thorough and complete diagnosis and the only way to obtain this is by a personal and private examination here in my office where I have every modern and scientific appliance and can give you my personal attention and the result of many years of successful experience in the diseases of my sepecialty.

You do not live very far from this city, therefore I would advise you to run in and see me at your earliest convenience, and I will grant you a FREE EXAMINATION AND CONSULTATION, and then you will know just how long it will take to effect a cure and what the cost will be. My fee will be no greater than you are able and willing to pay, and I will urge you to lose no time, as disease is always progressing and delay will only mean a longer and more difficult treatment.

Hoping to see you at an early date, and with my best wishes, I am

very respectfully yours,"

GMF/CBT

"Redlands, Cal. May 8th, 1913.

Mr. H. J. Tillotson, L. A. Cal.

Dear Sir:

I have often seen your ad in the Examiner and I thought I would write you in regard to your Rupture cure. That is to get you, if you would kindly send me free your Book on the Rupture cure only—as I believe you propose to send free. I am Ruptured on the left side—in the Groin and I have tried so many different so-called cures but all of them have proved a failure and I just thought I would like to see your proposed cure and read it through.

So in conclusion if you feel like sending it to me on above terms one—I will be ever so much obliged to you for so doing. There is no truss I don't think any good much. Yours truly,

D. H. BRONAUGH."

"May 9th, 1913.

Mr. D. H. Bronaugh,
Redlands, Cal.

My dear Sir:

I have your favor of recent date and in reply would say that it would be absolutely necessary for you to come to my office for consultation and examination before I can say what I would be able to do for your

case; I have absolutely no way to treat hernia or rupture by mail. I will grant you a free examination and consultation and you will be in no way obligated to take my treatment unless you are satisfied that I can help you and we can agree on terms.

I have had a great many years of experience in this line and have found but very few cases out of hundreds I have treated that were not amenable to my treatment, even when operations have failed I have cured to stay cured.

You do not live far away from this city and if you are interested in a cure of your rupture I think it would be time well spent to come in and talk it over with me.

With my best wishes, I am,

Very respectfully yours,"

HJT/CBT

"Redlands, Cal., May 12th, 1913.

Mr. H. J. Tillotson, Los Angeles.

Dear Sir: Yours first received and contents noted. I am much obliged for your favor. Will say I cannot well come to see you at L. A. for maybe over a month yet as I cannot well go away just now, but will try and come as soon as I well can. I am sorry I didn't get your book as I wrote you for. Now in conclusion I hope you will please excuse this scrap of paper, as I had no paper with me at time of receiving yours.

Yours truly,

D. H. BRONAUGHA."

"NEW

May 11th, 1913.

Mr. D. H. Bronaugh,
Redlands, Cal.

My dear Sir:

I have your favor of recent date and regret that you find it impossible to come in and see me soon.

I shall be glad to see you anytime you find it convenient to come in.

very respectfully yours,"

HJT/CBT

"NEW

Seligman, Ariz. 5/11/13.

Dr. G. M. Freeman,
Los Angeles, Cali.

Dear Sir: I see your ad in the Examiner and would like to have your treatment. I have got the cordee and I don't want to go to our home doctor for I have a family. If you can treat me by mail send me some medisin or a prescription and a bill for your charges and I will forward the money to you. I am a railroad man here and don't want my family to no what ales me. Hoping to here from you soon,

Yours rest. Over.

My address is Seligman, Arizona. E. D. LONG."

"May 11th, 1913.

Mr. E. D. Long,
Seligman, Ariz.

My dear Sir:—

I have your valued favor of this date and have noted carefully your condition as you have stated it; you are doing right to consult a specialist with many years

experience devoted to this line of diseases. But I regret very much that I have no method of treating you by mail. It will be necessary for you to make at least one trip in to my office for an examination and consultation and I could perhaps fix you up in a very short time.

As you are a railroad man you could perhaps get a few days off and transportation to and from Los Angeles, and I would advise you to try and do this as it is for your best interests.

Hoping to see you soon and regretting my inability to do any "mail order" business, I am,
very respectfully yours,"

GMF/CBT

Follow up 6/13/13"

"Seligman, Ariz. 6/16/13.

Mr. G. M. Freeman, M. D.

Los Angeles, Calif.

Dear Sir: Your letter of the 13th received. Will reply that it is impossible for me to come to your office at present. Would like to take your treatment. Would send you a small payment on receipt of some medicine and if benefited would make payments monthly but if you can't take my case by mail I will have to try elsewhere as I am not very bad I think I will get along with home treatment.

Yours very truly,

E. D. LONG."

“June 17th, 1913.

Mr. E. D. Long,
Seligman, Arizona.

My dear Sir:

I have your favor of the 16th and in view of the fact that you are unable to come in to see me at this time I am sending you by express C. O. D. a months supply of medicine which will take care of you until you can come in. Follow the directions marked on each bottle and let me hear from you as to your progress.

very respectfully yours,”

GMF/CBT

“Seligman, Ariz. 6/24/-13.

Mr. G. M. Freeman, M. D.

Dear Sir: Received your shipment of meadison one bottle broken. Find enclosed label of broken bottel so you will know what bottel it is. Pleas send one to replace I will commence taking according to directions. Hope you have received the \$10 on receipt of the exprese. I want to give you a trial it will be impossible for me to come to Los Angeles before the first of August. Hoping to here from you soon,

E. D. LONG.”

“June 25th, 1913.

Mr. E. D. Long,
Seligman, Arizona.

My dear Sir:

I have your letter of the 24th inst. and also the draft from the express company today, for which please accept my thanks; I am sorry that one of the bottles was

broken in shipment and have today forwarded you by express another supply of the injection, for which there is no extra charge.

If your case is an ordinary one with no serious complications the remedies I have sent you should take care of the trouble all right but as I mentioned in my former letters I make it a rule never to take a case unless I can see the patient for a thorough examination and then knowing all the facts and causes I can prescribe remedies from which I can guarantee a cure; however I trust that you will get along all right and will be able to come in and see me shortly.

With my best wishes, I am

very respectfully yours,"

GMF/CBT

"Seligman, Ariz. 6/30/13.

Mr. G. M. Freeman, M. D.

Los Angeles, Cal.

Dear Sir: Your letter of the 25 at hand received the injection O. K. and found it pretty strong dope. I gess it is becaus I am not usto taking strong doses that way Hope it will do the work I will continue your remedy and will call at your office as soon as I can get another day off but that will be a month or six weeks.

Yours rsp

E. D. LONG."

"July 2nd, 1913.

Mr. E. D. Long,

Seligman, Arizona.

My Dear Sir:

In reply to your favor of the 30th June regarding the

injection you received: If it is too strong for you dilute same with pure water, but use it as strong as you can without it burning too much, and I think you will get along all right.

I note that you expect to come in shortly and I think this is the best plan as it is very rarely satisfactory to prescribe for anyone when you have not had the privilege of an examination, and I want to do the best possible by you. Come in as soon as you can.

very respectfully yours,"

GMF/CBT

"Seligman, Ariz. 7/17/13.

Mr. G. M. Freeman, M. D.

Los Angeles, Cal.

Dear Sir: I have taken your meadison accordin to directions and I can see that I am improving but the mussels are still drawing in time of erection but not bad. I have medison enough to doo 2 or 3 days yet but have injection enough to do a month yet. Would like to continue your treatment till such time till I can get off and come to Los Angeles for examination. I cant tell just when that will be. Pleas send me some more medison I will enclose the labels from the medison that I am out of. Hoping to here from you soon I remain as ever your petient,

Yours resp.

E. D. LONG."

"1 Mo. 59 by mail.

"July 19, 1913.

Mr. E. D. Long,

Seligman, Arizona.

My dear Sir:

I have your letter of the 17th, and am sending you today by Parcels Post, some medicine, to be taken as per directions thereon

I trust you will be able to come in and see me at an early date, as I think you will require a little attention to correct the cords and muscles that you speak of and a day or so here will fix you up in good shape.

With my best wishes, I am,

Yours very truly,

GMF/CBT 9/10 Follow up letter."

"Seligman, Ariz. 10-11-13.

Dr. G. M. Freeman, M. D.

Los Angeles,

Dear Doctor: In answer of your letter of the 7th I am not cured by a hullot. I have bin east for a month to attend the death of my mother and have jus got back at work and just as soon as I get 2 or 3 pay days a hed I am coming to visit your office for I must get this cured. My eyes watters and my back hurts and the thing still draws to one side. If you could send me some medison to relieve it till I can come to see you and oblige, I remain,

Yours truly,

E. D. LONG."

"October 16th, 1913.

Mr. E. D. Long,
Seligman, Arizona.

My dear Sir:

I have your letter and have noted carefully your condition. I have forwarded you today by Wells Fargo Express C. O. D. \$10. a full months supply of remedy, to take care of you the best I can until you can find it convenient to run in here and let me give you a thorough examination to find the exact cause of your trouble, and I think then we can get you straightened out in short time.

With my best wishes, I am,

Yours very respectfully,

GMF/CBT 1 Mo. A-50-52

By Exp. C. O. D. \$10.00 10-14 Pd. 11-17."

"NEW Bakersfield, Cal. May 11, 1913.

Dr. G. M. Freeman,
Los Angeles, Cal.

Dear Sir/

Seeing you ad. in the Los Angeles Examiner many times I mad up my mind to drop you a line and ask you a few questions and I will put them to you just as if I wer in your office. When I go have an enter-cors with a womon I some times can do very well and then again I can only get what I call it is a half a hard on and I com off in about 3 or 4 strikes. I feell

all Right but if you can do any thing fore me I wold like to here from you.

Your truly,
WM. WAGNER,
P. O. Box 824 Bakersfield, Cal."

"May 11th, 1913.

Mr. Wm. Wagner,
Bakersfield, Cal.

My dear Sir:—

I have your valued favor of recent date and have noted carefully your condition as you have stated it.

Your trouble is directly in my line of specialty and I have had several years of successful experience and have cured hundreds of cases. Your trouble is no doubt caused by a complication of conditions that you do not realize and you should come in to my office at your earliest opportunity where I have every modern and scientific apparatus, and I will give you a free examination and consultation and then we can arrange for your treatment at your convenience. Not knowing all your symptoms or any facts in the case it would be impossible for me to advise you by mail.

Trusting that I may see you soon and assuring you of my personal attention, with my best wishes, I am
very respectfully yours,"

HJT/CBT

"May 5th, 1913.

Mr. J. F. Martin,
Agua Caliente, Ariz.

My dear Sir:

I have your two letters today and noted contents

carefully. I will try and take care of the party you are sending in to see me to the best of my ability; if he left there on Monday as you wrote he should be here either Tuesday or Wednesday. I want to thank you very much for your kind recommendations and in sending this party to me and will try and reciprocate the favor.

I have today sold out my offices and business to another Doctor but will be here myself for a few days more and my staff including my son, Dr. Charles Tillotson will probably be here indefinitely; but unless you are sure of your resources, etc. and are getting along even passably well where you are I would not advise you to come to Los Angeles just at this time as you suggest. I am going on a vacation for a month or two but will not start for perhaps ten days, so we can take of the party coming now alright, but I wouldn't advise you to come later unless you are sure of your ground.

With my very best wishes and kindest regards, I am,
Very respectfully yours,"

HJT/CBT

(Letterhead Hotel Modesti)

"Agua Caliente, Arizona, May 7, 1913.
Maricopa County.

H. J. Tillotson, M. D.

Los Angeles, Cal.

My dear Sir:

I do not mean to bore you with my letters but your letter of the 5th causes me some anxiety. When I learn you are to leave your offices, As to my resources,

I am not sure that is of money, but as far as board and room goes, I have friends there who will take care of that end of it; but I did not want to go to them if my father came to my assistance. Well my father wrote me yesterday and sent me \$3.00 that is all the money I have and all he can send me for some time and you know that won't go very far. If you go away, would I be sure of getting treatment from your successor or your son until I am well enough to work and then pay for services, if so I can make out all right. I have talked the situation over with the man I am going to come in with and he says I can stay with him when I get there if my friends can't look after me. I feel fine all over and could be working if it wasn't for the swelling that's in my legs. It gets worste the more I am on my feet.

Well Doctor for my part I am safe on board and room when I get there but I can't pay any medical fee until I am able to work, if its possible for you to arrange treatment for me, I am sure I will be far better off than staying here, I regret that you cannot look after me personally but hope it can be arranged for treatment to go on as it has when I come. Please reply soon.

Very truly yours,

J. F. MARTIN."

"May 9th, 1913.

Mr. J. F. Martin,
Agua Caliente, Ariz.

My dear Sir:

I have your letter of the 7th inst. addressed to Dr.

Tillotson and he has told me all about your case; I shall be glad to continue treating you and would be very glad indeed if you could come in to see me for a personal examination, etc. so that I could have a more complete idea of your condition etc. but as Dr. Tillotson told you in his letter we wanted you to be sure that you would have some way to provide for your living and necessary expenses while in the city; if you think you can manage this part of it I shall be glad to furnish medical treatment.

Mr. Godeke arrived the other morning and I have been treating him for three days now and I am glad to say that we have the swelling in his limbs almost entirely reduced and he is feeling fine; I want to thank you for your recommendations.

I have purchased Dr. Tillotson's interest in this office and take over all his patients, and would be glad to have you send anyone you can my way.

With my very best wishes, I am,
very respectfully yours,"

GMF/CBT

(Letterhead Hotel Modesti)

("OLD PAT.")

"Agua Caliente, Arizona, May 12, 1913.

G. M. Freeman, M. D.

Los Angeles, Cal.

My dear Sir:

I am in receipt of your letter of the 9th inst. and pleased to know I may continue treatment with you; as to my coming to Los Angeles that is now assured; we start from here Wednesday A. M. overland and

expect to reach the city in 10 or 12 days. As to my living and expenses; there was some doubt about that, untill I rec'd a letter Saturday from some people I formerly lived with in Los Angeles, telling me to come and stay as long as I wanted too. I thought they had left the city, but fortunately for me they are still there. If Dr. Tillotson is in the city when this reaches you I wish you would thank him for kindness extended me and if circumstances permit and I am in the city when he returns tell him I will see him personally. I can only do with you as I have done with Dr. Tillotson, relative to my account, and when I am able to work pay you as I can; I have a large acquaintance in Ariz. & know several people in Los Angeles, and I will try to get you all the patients I can. The man I am to drive in with, has a bad rupture and Liver trouble, so he says, and is talking of haveing some Clinic school there to operate on him. I will make an effort to induce him to come and see you first. He is pretty well broken up in health, about 65 yrs old but worth about \$10,000, he was advised by some Dr. in Los Angeles to take a trip to Arizona overland and instead of improveing he is worste, so with myself under the weather and him and the horse to look after I am going to have my hands full on the trip, but it is my only chance to get there and I will have to make the best of things. Unless something unforeseen happens I will not write again but will call at your office as soon as I reach Los Angeles the medicine Dr. Tillotson has been giving me has helped to reduce the swelling in my limbs some, but if I am on my feet much they swell up pretty bad. However there is a marked improvement and I

trust you will pull me through. I thank you for stamps and am returning what I will not need, thanking you for kind letter I beg to remain,

Yours very respt.

J. F. MARTIN.

P. S. We are all glad here to know Mr. Godeke is getting well."

(“NEW) “Clifton, Arizona, May 12-13.
Mr. G. M. Freeman,

Dear Sir: This will purhaps be a queer letter for you to read but I hope it will give you a pretty good idea of why I am so cautious. I am going to be married in August and feel as though I aught to consult with a man of your standing considering the recent trouble I have had. I feel it my duty that I be absolutely shure of every thing. This is all I will write you this time but will ask that before we go any farther that everything that goes between us in any way must be absolutely confidintial. That all mail or packages that may be sent me must be free from any writing denoting the sender. This must be between must you and I because to have anything get out amongst the people hear would be more than ruin to two lives. I believe you can understand me Dr. and we'll look for your early reply. I am (Over)

Yours truly,

HARRY NEIKEN,

Box 105, Clifton, Arizona.”

"May 15th, 1913.

(Box 105)

Mr. Harry Neiken,

Box 105, Clifton, Ariz.

My dear sir:

I have your favor of recent date and have carefully noted your statements. I am sorry to state that it would be necessary for you to appear at my office for an examination before I could pronounce you free from any disease and eligible to marriage, or before I could prescribe a course of treatment for you. I have no "Mail order" methods; My treatments are based entirely on scientific principals and here in my office I have every modern equipment and appliance for the proper administration of my methods which have proved very successful in my several years of experience in Los Angeles.

Would it be possible for you to run out here for a few days and let me look you over and thus place you in an absolutely safe position as regards your intended marriage and might save you much trouble and unhappiness? I will grant you a free examination and consultation and if you need no treatment I will tell you so.

With my best wishes and trusting to hear from you, I am,

Very respectfully yours,"

GMF/CBT.

"Clifton, Arizona, May 19, 1913.

"Your most open and frank letter received and I want to thank you for your most kind advise but I am

sorry to say that it would be impossible for me to go to Los Angeles to see you.

I am very sorry that you could not give me your opinion of my condition through the mail. I have the honest word of two Drs. in this town that there is no germs of that kind in me now but I would like to have the good judgment of a specialist but I believe these Drs. ought not to give a man the right to marie unless they were shure it was all right.

I am very thankfull for your kind answer Dr. and wish you the best of wishes and if I owe you anything for your services so far I would be pleased to pay. Again thanking you I am,

Yours very truly,

HARRY NEIKEN.

P. S. Over.

P. S. Although these Drs. here are not Specialists on these kind of troubles I beleave I am safe in taking there word."

"May 27th, 1913.

Mr. Harry Neiken,

Box 105, Clifton, Ariz.

My dear Sir:

I have your letter of the 19th inst. and note that you feel it impossible to come in to Los Angeles for an examination and that local Physicians have pronounced you all right. I hope you will understand that it would be fair neither to you or to myself for me to pass an opinion on your case without the privilege of of a personal examination, and I trust that the Physicians you have consulted have given you a proper test, such as a

microscopic slide, bacteria test, and urine analysis, which is only a part of the examination to which I would subject you were you in my office. Marriage, my young man, is a very serious matter and you want to be absolutely sure that you are absolutely clear of any trace of disease before you ask any girl to share her life with you; and only too often I find cases where proper precautions have not been taken and unhappy results always follow.

You owe me nothing for this advice but if I can be of any service to you at any time I trust you will call on me or refer any friends who may need any attention.

Wishing you all the success in the world, I am,

Very respectfully yours,"

GMF/CBT

(NEW) "Goldfield, Nevada, May 14, 1913.

Dr. G. M. Freeman,

Los Angeles, Calif.

Dear Sir:

Circumstances are such that it is almost impossible for me to call on you now, much as I would like to, hence this letter—

Since reading your little book "The Road to Perfect Manhood" I will give you all my symptoms. I feel sure that I am suffering from spermatorrhea.

I suffer from siminal emissions at night which are beyond my control—These happen about once a week and are weakening my constitution—It is always in the form of a dream and I am always awakened by it. They have come every week for little over a month now. Formerly they were two weeks and a month

apart. Am more easily exhausted than formerly and for the past week I have felt a weakness in my back—not actual pains but a sense of weakness, and almost the same feeling in my testicles—I can still have sexual intercourse but the act is shorter than it should be and my powers of erection are also weaker. At times when I have an erection there is a small amount of watery semen escapes. If there is any escapes with my urine I do not know it. I have no pimples on me or any other symptoms other than those described. Appetite and digestion are normal—When a boy I practiced the vice which you say is one of the chief causes of this disease but only for a short time. I am thirty now and unmarried but have always been with women freely until the last year. I was in the mountains and thrown away from their society and then was when my nightly emissions first came.—Have always been of a highly nervous and emotional disposition and for the last five years have worked at night a good portion of the time and trying to sleep days has helped to make me more nervous—have also worked for over two years now without a days rest and part of that time has been night work and I am worked out and my system is run down.

I trust you will candidly advise me about this trouble and tell me if you can cure me or give any relief. If I haven't stated my case fully enough I will gladly answer any questions you may ask. I have never had any diseases of the organs before and am worried very much about this.

This is a small mining camp where every one is known and I naturally desire this to be known only to

you, so please address me in a plain envelope without any marks whatever. Advise me about the cost of treatment, etc. in your letter. I will probably have to pay you on the installment plan as I am supporting my father who is over eighty and a crippled sister but I must have relief if possible.

Please advise me as soon as possible and I shall be very grateful to you.

Yours very truly,

W. S. GREGSON."

Box 613—Goldfield, Nevada."

"May 17th, 1913.

Mr. W. S. Gregson,

Box 613, Goldfield, Nev.

My dear Sir:

I have your letter of the 14th inst. describing your condition in detail, and I feel confident that with my years of experience in the practice of my Specialty that I could correct your trouble in a very short time. It would however be impossible for me to prescribe for you by mail, as a personal examination to give me a correct diagnosis would be absolutely necessary. There are perhaps other complications contributing to your weakness that I would have to find and correct before I could promise you a complete and permanent cure.

Trusting that you will find it convenient to make a trip here for a few days and put yourself under my personal care and where you will have the benefit of a personal consultation which is the only certain way for

a Physician to know his case, and with my very best wishes, I am,

very respectfully yours,"

GMF/CBT

"Goldfield, Nevada, May 21, 1913.

G. M. Freeman, M. D.

Dear Sir:—

Replying to yours of the 17th inst. will say that this being the vacation season and several of the men are away at present so that it would be impossible for me to leave just now without giving up my position entirely—By the first of July I can get away all right and I suppose I will have to wait until then unless my troubles gets worse—In that event I shall give up my place if I can't get a vacation—Since writing you there hasn't been much change in my condition except that I have had no emissions at night for over fifteen days now and I feel a little better for that.

I appreciate your letter and advices very much and shall call on you as soon as I can come to this city.

Yours very truly,

W. S. GREGSON."

"May 24th, 1913.

Mr. W. S. Gregson,

Goldfield, Nevada.

My dear Sir:—

I have your letter of recent date and note that you will be able to come down and see me about the first of July; this is the best plan as then I can look you over carefully and have a full understanding of your

case and can then intelligently prescribe for you so that your cure will be prompt and permanent.

With my very best wishes and trusting to see you at the earliest possible time that you can come, I am

very respectfully yours,"

GMF/CBT

"July 15, 1913.

Mr. W. S. Gregson,

P. O. Box 613, Goldfield, Nevada.

My dear sir:

You wrote me that you would be in for consultation and examination, about July 1st, but up to this time I have failed to see anything of you.

I would like to know how you have been getting along and if it would be possible for you to come in and see me. My advice would be not to neglect your condition any longer than possible, as diseases or disorders of any kind seldom get well themselves, and should have prompt attention by a competent doctor.

With my best wishes, and trusting to hear from you soon, I am,

Yours very truly,

GMF/CBT

(Follow up 11-17-13.)

"El Paso, Tex. 5/11/13.

Dr. G. M. Freeman,

Los Angeles,

Dear Sir:

I am dropping you a few lines to let you know of what I suffer five years ago I contracted a Disease a bad dose

of Gonorrhea. I had it for two years and half. All of a sudden it stoped. But I knew I wasn't well when it did stop for I have felt sick ever siense. I feel just as you describe it in the Los Angeles Examiner. Inclosed you will find clipping and I wish to tell you that I feel just as the clipping reads. I have no ambition. Whatever and I feel lost of vitality. My kidneys pain morning noon and night, my back pains me, always nervous and can't sleep at nights; Now Dr. I wish to tell you that this Dose is running again it has now been running on me for three months and I am feeling worst every day. I may have stricture. But how can I tell and I also wish to tell you Dr. that part of my break down is due to the fact that when I were a kid I abused myself and as I have now read the laws of nature, I feel the results of what then I didn't realised what bodily harm I was doing my self always when talking to some one that Bashful feeling comes up of course you know the rest. So I trust in you. That you shall cure me of all that I complain of so please answer soon and let me know what you will charge me also if I have to send advance money for medicine.

I wish to tell you also that there are two little sores at the end of my canal which are call soft schankers. Excause the word. But I must tell you what I have. I remain hoping to hear from you real soon, I am,

Very truly yours,

J. M. RAMIREZ.

No. 501 E. Boulevard St.

El Paso, Tex."

(NEW)

"May 15th, 1913.

(501 E. Boulevard St.)

J. M. Ramirez,

El Paso, Texas.

My dear Sir:

I have your favor of recent date and have carefully noted the description of your case as stated in your own words. Your trouble is right in my line of specialty and I assure you that with my experience and my office supplied with every modern scientific appliance that I could no doubt correct all your troubles in a very short time. It would be necessary however for you to come to my office for examination and treatment as I have no "mail order" methods, I take every case under my personal care which insures immediate benefits and permanent cures.

With my best wishes and trusting that you will find it convenient to pay me a visit in the near future, I am,

Very respectfully yours,"

GMF/CBT

"El Paso, Tex. 5/18/13.

Dr. G. M. Freeman,

Los Angeles.

Dear Sir:

Yours of the 15th inst. rec'd which I was very glad to hear from you. But am sorry to say that it is impossible for me to call at your office for examination. I hoped so much that you would be able to cure me at home. But as you say you have no (mail order methods) I just don't know what to do, and I must be cured for I am feeling worst every day. So please answer

soon and let me know if you cannot cure me unless I call at your office. Dr. if you can do anything for me I wish you please would, and it would be a great favor you would do me, hoping to hear from you soon I am,

Yours truly,

J. M. RAMIREZ,

El Paso, Tex."

No. 501 E. Boulevard

"May 21st, 1913.

Mr. J. M. Ramirez,

501 E. Boulevard, El Paso, Texas.

My dear Sir:—

I have your letter at hand this morning and will repeat that it would be necessary for you to make at least one visit to my office in order for me to make an examination as to all the causes of your trouble before I could honestly prescribe any treatment.

With my long experience in the successful treatment of the diseases of my specialty I feel confident that I would bring about very satisfactory results in your case in a very short time and if it is at all possible for you to make a short trip out here I would advise you to do so. If not I would advise you to consult some good reliable physician of your city.

Hoping that I may be able to be of service to you, and with my best wishes, I am

very respectfully yours,"

GMF/CBT

"El Paso, Tex. 6/17/1913.

Dr. G. M. Freeman,
Los Angeles.

Dear Sir:

Yours of the 13th inst. Rec'd. which I was very glad to hear from you. In regards to what you say, I wish to thank you very kindly for your kindly advice, as I told you in my last letter that it was impossible for me to call at your office for examination, and I am sorry to say. But I am being cured now by Dr. Ketchersid, the International Specialists of El Paso, Tex. So thanking you very kindly and sorry I could not come to Los Angeles to see you for treatment, I remain,

Yours truly,

J. M. RAMIREZ."

"June 20th, 1913.

Mr. J. M. Ramirez,
El Paso, Texas.

My dear Sir:

Your favor of the 17th received and I am glad to learn that you are receiving competent treatment and I trust you will soon be entirely well.

Should you ever come out this way or need my advice in anyway I would be glad to see you.

With my very best wishes, I am,
GMF/CBT very respectfully yours,

"Gold Road, May 14th, 1913. (NEW)

Dr. G. M. Freeman, Los Angeles, Cal.

Dear Doctor:

I shall greatly appreciate if you will kindly give me

your advice on my case. I am unable to call at your office being too far from Los Angeles.

I am 34 years old, 5 ft 11—165 lbs. single, suffer with spermatorrhoea since ten years. This due to early dissipations when I was 12 to 16 years old. Never had any blood disease. Tried every kind of treatment without results. Lost my position and memory and all the money gone in travelling expenses and doctors fees. I have very heavy losses of semen every day. If you think you can cure me I will owe you more than my life. The early reply stating your fee and conditions will be greatly appreciated.

Yours very truly,

H. THEURIET,
Gold Road, Arizona."

"May 15th, 1913.

Mr. H. Theuriet,
Gold Road, Ariz.

My dear Sir:—

I have your favor of the 14th inst. and have noted carefully all you say regarding your condition, and I assure you that if you could come in and see me for a few days that I could bring about good results in your case, but I have no "mail order" treatments of any kind and unless you can come in to my office it would be impossible for me to do anything for you. By coming here you would be under my personal care and attention and have the benefit of my long years of successful experience. Also in my offices I have every modern apparatus and appliance for treating the diseases of my specialty and you would be assured of

proper treatment. It would be a pleasure to me to correct your troubles and give you back your health and manhood.

If you can possibly come to Los Angeles I would advise you to do so for your very best interests, and I will grant you a Free consultation and examination and if I cannot convince you of my ability to cure where others have failed you will not be obligated to take my treatment or pay me a cent. Isn't this a fair proposition?

With my best wishes, and trusting that I may see you soon, I am,

Yours very respectfully,

GMF/CBT

"Gold Road, June 16th, 1913.

Dr. G. M. Freeman,
Los Angeles, Cal.

Dear Doctor:

Your favor of the 13th inst. just at hand. I beg to inform you that though anxious to call at your office, it is quite impossible for the present. I could not meet the expenses of the trip, fees and living expenses for the time I would have to stay in Los Angeles. I have been hurt in the mine last week and compelled to stop working. That will not help me. I shall appreciate if you will let me know approximately what are your fees and how long. I will have to stay at Los Angeles

so I could judge as soon as I should be able to go and see you. Thank you for your kind letter.

Yours very truly,

H. THEURIET,
Gold Road, Arizona."

"June 19th, 1913.

Mr. H. Theuriet,
Gold Road, Arizona.

My Dear Sir:

In reply to your favor of the 16th inst. I would advise you to come in and see me if you can stay but one day or long enough for me to go over your case thoroughly and get a correct Diagnosis of your trouble, which is necessary before I could intelligently prescribe for you or promise you a satisfactory and complete cure.

I am sorry to hear of your injury in the mine and trust it will not seriously delay your coming to see me. You need not worry any about my charges; the fee is not my entire consideration, I want to get you back to perfect health and strength again, and my charges will be no greater than you are able and willing to pay.

Trusting that you will be able to come in and see me soon and with my very best wishes, I am,
very respectfully yours,"

GMF/CBT

"July 12, 1913.

Mr. H. Theuriet,
Gold Road, Arizona.

My dear Sir:

I have been wondering how you are getting along and if it would be possible for you to come in and see me.

I wrote you in my letter of June 19th that money was not my entire consideration, and that if I felt that you were sincere in your desire to obtain a quick and permanent cure, that we could no doubt arrange payments that would be satisfactory, and trust that you will be able to come in and see me at an early date.

With my very best wishes, I am,
GMF/CBT Yours very respectfully."
(Last follow up 11/14/13.)"

Gold Road, Nov. 20th, 1913.

Dr. G. M. Freeman,
Los Angeles, Cal.

Dear Doctor:

Your favor of the 12th inst. at hand. In answer I will say that I am perfectly convinced that no medicine can cure me. I tried so many, some from very good doctors some from quacks, that now I can see my mistakes. Sometimes after a month or two of treatment I got some relief, but as soon as the stomach get use to it the improvements stops and after I am worst than before. The art of medicine has made great progress in some branches but in regard to my case, it is as far advanced than it was last century.

I had too many promises to be cured to have any faith now. If you think you could cure me, I appreciate your kindness to offer me your services.

Yours very truly,

H. THEURIET."

"November 21st, 1913.

Mr. H. Theuriet,

Gold Road, Arizona.

My Dear Sir:

I have your letter of the 20th inst, and have carefully noted what you have to say. I do not care how many Doctors have failed with your case I feel confident that I can correct all your troubles in a very short time, if you will allow me to make a thorough examination and get a true diagnosis. I am so confident that I can do this that if I cannot help you I do not want any of your money. I trust you will be able to come in and see me soon for I know that you are sincere in your desire to effect a cure and to regain and keep your full strength, and having taken a deep personal interest in your case I want to do everything possible for you.

Trusting to see you soon and with my best wishes,
I am,

Yours very respectfully,

GMF/CBT

"Lordsburg, Cal., May 17, 1913.

Dr. G. M. Freeman,

Your letter advises prospective patients to consult Dr. Hamilton. On the other hand, you ad indicates

that you have bought out another concern and advertising for customers. How is it? You asked 75 dollars for my case which I could not do. If you will take it for 50 dollars accept 10 dollars down and balance at time or before you are through, will call at my earliest convenience. Please advise.

Respy,

Plain envelope, please.

A. R. PECK."

(PAT)

(Called June 7-12)

"May 20th, 1913.

Mr. A. R. Peck,

Lordsburg, Cal.

My dear Sir:

Your favor of the 17th inst. at hand and carefully noted. At the time the letter you mentioned was sent out I did not know that I would later buy out the office and business of Dr. H. T. Tillotson, but I now have the finest and best equipped office for the treatment of the diseases of my specialty in the Southwest and am better able than ever to offer you the best professional services.

From your letter I take it that you are sincere in your desire to obtain a cure, and to show you that the fee is not my entire consideration and that I want an opportunity to help all who are afflicted, if you will come in and see me at an early date I will take your case on your terms and give you my best personal attention.

Trusting to see you soon and with my best wishes,
I am,

Very respectfully yours,
HTT/CBT."

"July 12, 1913.

Mr. A. R. Peck,
Lordsburg, Calif.

My Dear Sir:

It has been over a month since you were in and commenced treatment, and as I take a personal interest in all my patients, I would like to hear as to your progress, and if it is convenient would be glad to have you come in and see me. Your medicine must be gone by this time, and if you need a new supply, be sure and let me know.

With my very best wishes, I am,

Yours very truly,"

GMF/CBT

"Lordsburg, Cal., Aug. 25, 1913.

Dr. G. M. Freeman,

Dear Sir:

Inclosed money order 5 dollars. Please send in plain wrapper by Wells Fargo Express viz. Pacific Electric supply medicine. Expected to be up before now. Will soon as possible.

A. R. PECK. 5.00 O. K."

"August 26th, 1913.

Mr. A. R. Peck,
Lordsburg, Cal.

My Dear Sir:

Your letter at hand and contents noted, and I am forwarding by Wells Fargo Express today a months supply of medicine as per your request; I shall be glad to have you run in and see me whenever it is convenient.

With my very best wishes, I am,

Very respectfully yours,"

GMF/CBT

IMO.—86—Q 40."

"Lordsburg, Cal., Oct. 21, 13.

Dr. Freeman,

Please send supply medicine by Wells Fargo express in plain wrapper, marked via Pac. Elec. Ry. Five dollars enclosed.

A. R. PECK. 5.00."

"October 22nd, 1913.

Mr. A. R. Peck,
Lordsburg, Calif.

My Dear Sir:

Your letter with remittance received; many thanks. A Months supply of medicine has gone forward to you today marked "via Pacific Electric Ry." as requested and I trust same reaches you in good order. You failed to report on your condition so I do not know how you are getting along. I trust you are improving

and you will if you take this medicine regularly.

With my best wishes, I am,

Yours very respectfully,

GMF/CBT 1 Mo.—86—Q—40 By Exp. 10-22."

"Bakersfield, Cal. May 18, 1913.

Dr. Freeman:

Enclosed find order for \$5.00 on same as a visit account as I want a prescription for weekness. I am 24 now and for the past 6 years I hit the high places in all its branches. I have turned so now that when ever it gets hard there is a discharge just the same as if I had an intercourse with some women and believe me it has me pretty week in strength and in mind right now. What I want is something even to stop me from getting so passionate and I have a little will power left. Put plenty of salt pedder in your prescriptions just as the army does for the soldiers. It happends to me 4 out of 6 nights a week now.

Kindly send prescriptions so as I can have it filled and state your fee also. I will send as soon as I can make a little money if the \$5.00 is not enough for this prescription. Do this doctor for a fellow who need a turn in life.

Address M. Murphy, c/o T. L. Hathron, Box 802 Bakersfield. Cal. In plain envelope please. Hoping this is plaine to you will close.

(PAT) "May 19th, 1913.

Mr. M. Murphy,
c/o T. L. Hathorn,
Box 802 Bakersfield, Cal.

My Dear Sir:

I have your favor of the 18th inst. with money order for \$5.00 and I have noted carefully all you have said about your condition. Before any Physician can give his honest opinion and make a correct diagnosis of any case so he can intelligently prescribe for the treatment of same, it is necessary that he see his patient personally and make a thorough and complete examination as to causes; in my wide experience I have found that there are often many causes contributing to the weakness you speak of, which have to be remedied before a cure can be effected, and of these the patient is many times not aware. The only way for this to be done would be for you to run down and see me so that I can go over your case with you privately and in detail, and then I would know just what treatment to prescribe for your individual case and could no doubt have you fully well in a very short time. I have no "Mail order" methods but after a visit to my office and a thorough knowledge of your case, if it is not possible for you to remain a few days I can probably prescribe treatments that you can take home with you.

Trusting that I may have the pleasure of seeing you soon, and with my very best wishes, I am,
very respectfully yours,"

GMF/CBT

"Bakersfield, Cal. May 20, 1913.

Mr. Freeman:

Received your letter Tuesday and fully expected some kind of a prescription in it. You state that I should come to Los Angeles to see you but that is practically impossible. I am a bricklayer buy trade and working here with my brothers who don't know my failing so there fore I cannot come as they would let my mother and sisters in on it. I want this personal if possible.

This statement ought to be clear enough for a prescription to start with any way and help a fellow I am 24 years of age don't drink or smoke never had either in my existence but got in with a fellow who abused himself and taught me the same. I done that for 2 years at least and then got money and went with French girls such as being blowed off and all that kind finely it got so that I dreamed off each night and it has got me weak in helth strength and mind so you see thats the story all told. My kidney hurt from a dull back ach on account of being week.

You ceartenly can understand that. Kindly send prescription so I may start anew and you ceartenly will be paid your feet. Address M. Murphy, c/o T. L. Hathorn, Box 802, Bakersfield, Cal."

"May 24th, 1913.

Mr. M. Murphy,
c/o T. L. Hathorn, Box 802,
Bakersfield, Cal.

My Dear Sir:

I am in receipt of your last letter and have care-

fully noted your statements and am exceedingly sorry that you find it impracticable to come down and see me at this time. I have taken a personal interest in your case and would like to have the opportunity of finding and correcting your trouble which I think I could do in a very short time if I could but see and examine you in person.

I am sending you by parcel post this after noon a supply of medicine which will help you along until such time as you can come to have a complete examination; understand however I cannot promise you a complete cure as that would not be fair to either you or myself, as in most every case I examine I find some trouble which the patient did not realize was contributing to his weakness, and I must first find and correct this cause before I can promise you a complete and permanent cure. The tablets I am sending you will be palliative in action and will help you along until such time as you may find it convenient to come in and see me.

With my very best wishes for your health and success, I am,

Yours very respectfully,"

GMF/CBT

"Bakersfield, Cal. May 26, 1913.

G. M. Freeman, M. D.

Rec'd your letter also Medicine today and will start taking them as directed on box. Will let you know if any improvement is anexed out of medicine.

In meantime glad to get a start on new life once again.

M. MURPHY,
Bakersfield, Cal."

"July 15, 1913.

Mr. M. Murphy,
P. O. Box 802, Bakersfield, Cal.

My dear Sir:

I would like to have a report on your condition, as it has been some time since you commenced treatment, it is absolutely necessary that you give me your co-operation and follow instruction as regards taking the medicines prescribed, if you expect to get good results.

With my best wishes, and trusting to get a favorable report from you soon, I am,

Very respectfully yours,

GMF/CBT"

"Bishop, Calif. May 20 13.

Am writing you in regards to a very displeasurable rash that has be on my face for some time. My face is very numerous with blackheads and these blackheads and these form into pimples and is a very displeasing sight. I know it was not brough on by follies of youth, for I am certain I was never induced to such temptations. I have had quite a bit of intercourse with young women but I think that is not the cause of it. If you could give me any advise on the matter or if you could or had a treatment for such that could be sent by mail

I would gladly pay well for it. Hoping to hear from you at the earliest convenient time, I remain,

ARTHUR M. CLARK,

Bishop, Cal. Box 254.

P. S. Will say I am infected with night losses when am out of town occurring about 1 every 10 day."

(Pimples, RaHS, Night losses—)

"May 22nd, 1913.

Mr. Arthur M. Clark,
Box 254, Bishop, Calif.

My dear Sir:—

I have your favor of the 20th inst. regarding your condition and feel sure if you will call and see me that I can find and remove the cause; but no Physician can honestly prescribe for or get a correct diagnosis of any case without the privilege of a private examination, therefore I would advise you to make a trip to Los Angeles and let me look you over and if you find it impossible to stay a few days I can perhaps arrange for a treatment to be taken with you.

Hoping that you will be able to come down and see me and assuring you of my best personal attention and my best wishes, I am,

Very respectfully yours,"

GMF/CBT

(No. 1 Follow up letter 6-13).

"July 15, 1913.

Mr. Arthur M. Clark,
P. O. Box 254, Bishop, Cal.

My dear Sir:—

I have written you two letters since your inquiry

dated May 20th, and had hoped to hear from you before this time.

From the description of your trouble, you should have competent medical attention, and as I wrote you before, I am in a position—with long years of experience, to render you valuable assistance, and I trust you will find it convenient to come in and see me, or at least to favor me with a reply.

With my best wishes, I am,

Very respectfully yours,"

GMF-CBT

"Swansea, Calif. July 24, 1913.

Mr. G. M. Freeman,

Dear Sir:—

Rec'd your letter of the 15th inst. Would of answered your letter of past date only I mislaid it and through carelessness neglected to write. But will endeavor to explain to you the reasons for not making a call on you before this time. At present am operating a tramway for a salt co. and have made them a promise I would remain with them for the period of one year. I also know that I need this medical attention but must postpone my trip to your city until this winter. They close down for the course of 2 mo. on acct. of snow and as soon as these months come you can depend upon me to make a call on you. But I wish to ask your advice as to what I could do in the mean time. Is there such a thing as overeating or eating certain articles. I would like to keep in corresponding

with you on the matter until I can come and see you personally. Hoping to hear from you soon, as ever,
c/o Saline Valley Salt—ARTHUR CLARKE,
Company," Swansea, Calif.

"July 26th, 1913.

Mr. Arthur M. Clark,
Swansea, Cal.

My dear Sir:—

I have your favor of the 24th inst. and note your new location and inability to come and see me soon. In view of this fact and to take care of your condition in the meantime I would recommend that you allow me to send you a course of treatment until such time as you can come in for an examination. This I will do for \$10. per month if satisfactory with you, and I will give you something to clear up the rash and pimples, and also to take care of your losses.

When you reply please fill out and return the attached blank in as far as it applies to your case, so that I may have as concise a history of your complaint as possible.

With my very best wishes, I am,
GMF/CBT very respectfully yours,"

"November 17th, 1913.

Mr. Arthur M. Clarke,
c/o Saline Valley Salt Company,
Swansea, Calif.

My dear Sir:—

I had some correspondence with you some time ago relative to your health and you said you expected to

come in to see me this winter. I trust that your condition has not grown any worse and that you will be able to come down for a thorough examination and start treatment soon.

Trusting to hear from you soon and with my very best wishes, I am,

Yours very respectfully,"

GMF/CBT

"Hayden, Ariz. May 31, 1913.

Dr. G. M. Freeman,

Dear Sir: I am afflicted with varicocele on the left side. It does not give me any pain. I am a locomotive fireman and I can't get employment, the doctors turn me down when taking examination. If you can make the notted veins disappear I would be glad to try your cure.

Yours truly,

EDGAR BANKS."

(NEW)

"June 2nd, 1913

Mr. Edgar Banks,

Hayden, Arizona.

My dear Sir:—

I have your letter stating that you are afflicted with varicocele and I appreciate your position for I know just how it affects and drags a man down. I am a Specialist of long years training and experience along these lines and I assure you that I can remove every sign of your trouble if you will come in to my office and let me look you over and prescribe the proper treatment. It will be absolutely necessary for you to come

here for a few days treatment as I have no "mail-order" methods, I treat to cure and stay cured.

Trusting that you will be able to come in to see me soon and with my best wishes, I am,

very respectfully yours,"

GMF/CBT

"Los Angeles, Cal. 6-18-13.

G. M. Freeman, M. D.

Dear Sir:

Yours of the 17 at hand and in reply will say that I think you are too high with your fees so I had to go to my family Dr. I am getting along slow. Am getting better. I would of liked too of taken the 606 treatment but you wanted moor money than I could pay.

Hoping this will reach you, I am,

Yours truly,

W. J. HARDY."

(Prosp)

June 20th, 1913.

Mr. W. J. Handy,

4210 Nassau St., City.

My Dear Sir:—

I have your favor of the 18th inst. and I am sorry that you did not let me know when you were in here that you felt unable to pay the fee that I named you and which is the usual one; The "914" treatment is what you want and will correct your trouble for all time; that fee is not my entire consideration. I want to be of help to everyone who is afflicted and if you will come in and talk things over with me, I think we can arrange my charges to your entire satisfaction as I

think you are sincere in your desire for a cure and I want to help you.

Hoping to see you soon, I am,

very respectfully yours,

GMF/CBT

(Called June 2nd—2 follows ups—N. G.)

(Letterhead: Mint Pool Hall and Smoke House,
Casner Brothers)

(Rec'd 20.00 Glad to have call at new office.

“Lordsburg, N. Mex. May 21, 1913.

Dr. G. J. Freeman,

254 S. Broadway.

Dear Sir:—

Find enclosed money order for \$20 (twenty dollars) a payment on my account. Please acknowledge receipt of this so I will know whether or not I have the right address as I see in the papers you have changed.

Have entirely recovered from my recent illness and am feeling fine again. Will be in Los Angeles some time this summer and will come around to have you make blood test.

Will make final payment of \$15 next month.

I beg to remain,

Yours sincerely,

JOHN H. MENZIE,
228 So. 4th Ave. Tucson, Ariz.”

“May 24th, 1913.

Mr. John N. Menzie,

228 So. 4th Ave. Tucson, Ariz.

My dear Sir:—

Yours received this morning with enclosure of \$20

for which please accept my thanks and your account has been duly credited.

I have purchased the office and equipment of H. J. Tillotson, M. D. corner third and Broadway and now have the finest office in the Southwest; I shall hope to have you refer some patients to me. I note that you expect to be in Los Angeles this summer and I shall indeed be glad to see you at any time.

I am glad to hear that you are getting along nicely and shall hope to hear that you continue well and prosperous.

With my best wishes, I am,
GMF/CBT very respectfully yours,"

"Lordsburg, N. Mex. July 9, 1913.

Mr. G. M. Freeman, M. D.

Dear Sir:—

Find enclosed \$15 final payment on my account.

Do not know just when I will be in Los Angeles, but will be around to see you when I do get there.

Yours respectfully,

JOHN H. MENZIE,

228 So. 4th Ave. Tucson, Ariz."

(Rec'd \$15.00 Thanks.)

"July 12, 1913.

Mr. John H. Menzie,
228 South Fourth Avenue,
Tucson, Arizona.

My Dear Sir:

Yours of the 9th, with \$15.00 enclosed, received, for which please accept my thanks.

Will be glad to see you when you come in, and with
my best wishes, I am,

very respectfully yours,"

GMF/CBT

"Wineville, Cal., May 21, 1913.

Dr. Freeman,

My dear Sir:—

I see that you have moved. Now, I want to know
if you want me to come and see you any more. I am
a great deal better than when I first came to see you,
but I was wondering if you would write me a prescrip-
tion that would be a little extra stimulating on the
sexual organs. I have got a girl in Los Angeles and
I guess you know the rest.

I am not quite able to keep up with what she wants
and if you could help me in that line it would be greatly
appreciated.

Yours truly,

FRANK STEPHENSON,
Wineville, Calif."

(PAT)

"May 26th, 1913.

Mr. Frank Stephenson,
Wineville, Cal.

My dear Sir:—

I have your letter of the 21st inst and was glad to
hear from you. I now have one of the finest and best
equipped offices in the Southwest and will be pleased
to see you at any time, and I think I will be able to

fix you up in the best possible manner if you will call.

Trusting to see you at an early date, I am,
BMF/CBT very respectfully yours,"

(PAT) "Lone Pine, Calif. May 26, 1913.

Dr. G. M. Freeman,
254 S. Broadway,
Los Angeles, Cal.

Dear Sir:

I became inoculated with syphilis 3 years ago last Jan. I let it run until the secondary stages began to appear and there commenced a vigorous treatment of mercurial injections, combined with iodides internally. I took about 65 of these treatments the first year. I then moved to Los Angeles and rested from treatment for about 8 months and began and took about 20 injections of "caccadyliate" (I am not sure of the spelling but I hope you will get the name correctly). I then let things run as they were for about four months and began to take Parke Davis & Co. "mixed treatment No. 1" the formula of which is:

Potassium Iodide 2 grains.

Syrup of Ferrous Iodide 5 Mins.

Mercuric Chloride Corrosive 1-64 gr.

Solution Arsenams & Mercuric Iodides 2 mins.

Tuict Nux Vamica U. S. P. 1880 2 mins.

I took 3 tablets a day and in the last year have used about 400 tablets as I found that I could not stand them continuously on account of my stomach.

I have a swelling on the forehead that diminishes in size and will finally disappear upon taking a few tablets—but it reappears in a short time. I have had a

few blotches on my forearm but they only last a few days and disappear also. I have no other swellings—neither Have I any bone pains except a bad headache after a short time has passed since taking treatment or using the mixed treatment I spoke of. Otherwise I feel and look perfectly healthy. I am out doors every day—leading a very active life—sleep outdoors etc.

Now what I want is this—a treatment that *will not hurt my stomach—one that will suppress all symptoms and not cause any eruptions*. In fact I want a treatment that even if it does not cure, will suppress the indications from public view. As soon as I can I intend to come in and get a treatment of No. 914. I will be greatly obliged if you will send me all information possible on this subject—together with the costs and the after effects, but at this time it will not be possible for me to get away, so I want the other treatment and if possible I want it *not in fluid, but tablet form*.

I hope my statement of condition etc. has been clear enough but in case it has not—please send me a symptom blank which I will fill out and return at once. Also tell me what your charges will be etc. I will be greatly obliged if you will use plain paper and envelope in answering.

Hoping to hear from you at once, I am,

Sincerely,

H. M. PEFFLEY,

c/o E. Robinson Estate, Lone Pine, California.”

"May 28th, 1913.

Mr. H. M. Peffley,

Lone Pine, Calif.

My dear Sir:—

I have your letter and have carefully noted all your statements, and what I believe you should have hust as soon as you can possibly come in to see me is the "914" or improved "606" treatment from which all the objectionable features of the original "606" have been removed. This, I feel positive, will cure you of your trouble for all time, if properly administered as I give it here in my well equiped office, using only the genuine imported Dr. Ehrlich's "914". I shall be glad to explain to you all the details of this marvelous discovery when you come in.

In the meantime for your temporary relief I am sending you a course of treatment of my own prescription which I find superior to anything else as it causes no derangement of the stomach.

I would advise you to come in and see me at your earliest convenience, for I appreciate your position perfectly, and want to see you obtain permanent relief.

Hoping to see you soon, and with my very best wishes, I am,

very respectfully yours,"

GMF/CBT

"Lone Pine, Cal. June 16, 1913.

Dr. G. M. Freeman,

524 S. Broadway, Los Angeles, Cal.

Dear Doctor:

I wrote to you some time ago giving you as best I

could the symptoms in my case and asked you concerning No. 914 treatment. You sent me treatment and it has benefited me a great deal. In fact the swelling on my forehead has almost entirely disappeared. The liquid is about $2\frac{1}{3}$ gone. I have plenty of the tablets yet. I have not used any of the tablets for regulating the bowels.

If you think advisable I will continue the same treatment. However, I will need more liquid medicine I have enough to do about ten days yet. Now do not send any more C. O. D. but answer my letter and tell me the price and I will send same by money order and then you may forward the medicine.

I wish you would give me particulars concerning 914 as I will take this in the fall.

Sincerely,

H. M. PEFFLEY,

Long Pine, Inyo County, California.

c/E. Robinson Estate. I will not accept any C. O. D. packages—so do not send any”.

“June 19th, 1913.

Mr. H. M. Paffley,
c/o E. Robinson Estate,
Lone Pine, Calif.

My dear Sir:—

I have your favor of the 16th inst. and have forwarded you by express another supply of the liquid medicine as you requested. I note your request about the C. O. D. shipment; you may send me \$4 upon receipt of this supply.

I am glad that you will be able to come down for

the "914" treatment soon which I think will remove your trouble for all time. My charges are based on the condition of the patient and whether or not it will be necessary to give you the second treatment; my charges are always reasonable and no more than you will be able and willing to pay. I use only the genuine imported Dr. Ehrlich Neosalvarsan which makes a great difference when the price some other Doctors offer is considered.

Trusting that you will get along nicely and with my very best wishes, I am,

GMF/CBT.

very respectfully yours,"

(NEW)

"Clifton, Ariz. 5-31-1913.

Dear Sir:

As I have been reading in the Los Angeles Examiner as to what you can do in regards to middle aged men, I am a man of 39 years and thought that I would see what you could do for me as you say you can cure such as weakened vitality and power of man.

Yours truly,

My address is Box 1436 Clifton, Ariz.

ED. KNIGHT."

"May 26th, 1913.

Mr. Ed Knight,

Box 1436—Clifton, Arizona.

My dear Sir:—

I have your letter of recent date and have carefully noted your statements. My advertisements speak the entire truth. Mr. Knight, when they state that I have modern scientific methods for building up a weakened

vitality, but as such conditions are usually brought about by complications from other troubles, sometimes symptoms of which the patient is not aware of, it is always necessary for a Physician to get a correct diagnosis by a careful personal examination before he can intelligently prescribe for or hope to remove the conditions contributing to the patients weakness.

Therefore if it is possible for you to come in and see me for a consultation and examination I will be glad to give you my best personal attention and can promise you the very best results. My treatment will only take a few days of your time and will not inconvenience you in any way, nor interfere with any business or pleasure you may wish to attend while in the city.

Trusting to see you soon and with my very best wishes for your health and success, I am,
very respectfully yours,"

GMF/CBT

"July 15, 1913.

Mr. Ed. Knight,
Clifton, Ariz.

My dear Sir:—

May I ask as to your present health and condition, and if it would be at all possible for you to come in and see me.

I have had no reply to my recent letters and would be glad if you would favor me with word as to your intentions, so I may know what to do with my record of your case.

Yours very truly,"

GMF/CBT

"November 14th, 1913.

(Letter returned)

Mr. Ed. Knight,

Box 1436, Clifton, Arizona.

My dear Sir:—

I have not heard from you in some time and would like to know if you have ever received a cure for the trouble you wrote me about. I advised you to come in here for a personal examination so that I could get a correct diagnosis and know how best to take care of you in the shortest possible time. Is it impossible for you to do this at this time. If so if you will write me fully about your case, I shall be glad to advise you fully.

Trusting to hear from you at an early date, and with my very best wishes, I am,

GMF/CBT

Yours very respectfully."

(Envelope: Addressee to "Mr. Ed. Knight, Box 1436, Clifton, Arizona." Postmarked "Los Angeles, Cal. Nov. 15, 1913 10 A. M." "Returned to writer UNCLAIMED." Original letter also ~~as above~~ returned.)

"Mr. Dr. Freeman.

You send mir plis one adres of some Germen Dr. E. have eihrt or nien Weeks Gonorrhea (German Tripper) Work here in a Camp and faind not one Doctor, not mi tork. Mei adres is Karl Glaser, Fellows, Kern Trading Oil Co. Camp 21."

(Followed up No. 1-6-13. Spec. 7-15.)

"May 28th, 1913.

Mr. Karl Glaser,
Fellows, Cal.

My dear Sir:—

I have your letter this morning and I think that if you could come down here and see me for a few days that I could fix you up all right; it would be necessary for you to appear at my office for a personal examination and then I could probably fix you up with treatment you could take with you back to your work and you would not have to stay here in the city very long; my honest advise would be for you to come down here for a few days treatment at least before your disease gains such headway that it might cause you lots of trouble. I make a specialty of this line of diseases and assure you that I can give you the very best scientific treatment.

I do not believe I know of any German Doctor in your immediate vicinity who I could recommend to handle your case. Trusting that you will find it convenience to come and see me and with my very best wishes, I am

very respectfully yours,"

GMF/CBT

"July 15, 1913.

Mr. Karl Glaser,
Camp 21, Kern Trading Co.,
Fellows, Calif.

My dear Sir:—

You wrote me sometime ago regarding your trouble, and I have written you twice without any reply.

I would be glad if you would let me know how you have been getting along, and if you are still in need of medical services, I would be glad to have you come in and see me.

With my best wishes, and trusting to hear from you soon, I am,

very respectfully yours,"

GMF/CBT

Los Angeles, Cal. May 3, 1914.

(PAT)

Dr. G. M. Freeman,
254 So. Broadway.

Dear Sir:

I received your letter yesterday. I am not well yet and I am not any better than I was up when I came to see you but that is not why I stoped coming to you, the week after I was at your office I lost my job an have not had any money. Yesterday my little boy broke his collar bone an my wife has been sick so you see I have bin up against it. I am working now, an will be in to see you as soon as I can get some money. I would like very much to be cured. I am not living at 425 No. Bonnie Brae any more. I am at 727 E. 28th St. an my telephone is South 2178.

Yours truly,

E. E. MANNEL."

Mr. Stone: We next offer in evidence the entire correspondence of the office for June, 1913, being original letters received from patients and the copies of the

replies, showing the manner in which the office was conducted.

Mr. Moody: May I ask, Mr. Stone, if you will include in your offer— You say “from the office.” Will you include in your offer from what office, giving the location of the office?

Mr. Stone: Well, I deem the location of the office immaterial on this matter, if they were doing the things you claim. Personally I don’t know, but they were from Los Angeles.

The Court: I would suggest, gentlemen, I would not think the location of the office is material.

Mr. Moody: The only reason I had in making that suggestion was that this witness testified he severed his connection in the spring of 1913 and started an office of his own, and manifestly what he did by himself would have nothing to do with the conspiracy.

The Court: Of course, that is right, too.

Mr. Moody: That is the reason I wanted him to say whether it was from his own office, or the office of the other parties.

Mr. Stone: We next offer in evidence the correspondence—

The Court: Well, get the record straight.

Mr. Stone: That is No. 2, for June, 1913.

The Court: Do you want this witness to testify as to this correspondence?

Q. By Mr. Stone: Examine that, doctor, for June, 1913, and see if that is correspondence received and copies of replies from the office.

(Testimony of Gideon M. Freeman.)

Q. By the Court: You are familiar with it, are you, doctor?

A. Yes, absolutely.

The Court: All right, then. Let it be marked.

Mr. Moody: The same objections.

The Court: The same objections and the same ruling. Let it be marked for identification, those two documents, Exhibit 1 for Identification and Exhibit 2 for Identification.

Mr. Stone: Exception to the ruling. Ex. 12.

Q. By Mr. Stone: I will ask you to examine for July, and ask you if this is correspondence of the office—that is, I am asking you now if it is correspondence from people with whom you were actually dealing and treating in a business way?

A. Yes, sir.

Mr. Stone: Then the correspondence for July is offered in evidence, if Your Honor please, as Defendant's Exhibit No. 3.

The Court: The same objection?

Mr. Moody: The same objections.

The Court: The objections will be sustained.

Mr. Stone: Exception. Ex. 13.

The Court: It will be marked Defendants' Exhibit 3 for Identification.

Mr. Stone: I next show you an exhibit of letters and ask you to state if those are the original letters received and copies of replies for the month of August?

A. August, yes, sir.

Mr. Stone: We offer these as Exhibit No. 4.

Mr. Moody: The same objections.

(Testimony of Gideon M. Freeman.)

The Court: The same ruling.

Mr. Stone: Exception. Ex. 14.

The Court: Mr. Stone, I suggest, if these are all the same, does not one exhibit raise the question?

Mr. Stone: I would rather have them all in, Your Honor, to save any question about it.

The Court: All right, go ahead.

Q. By Mr. Stone: I show you correspondence purporting to be for September, 1913, and ask you to state if that is the correspondence of the office. Is that correct, doctor?

A. That is correct.

Mr. Stone: We offer this as Defendant's Exhibit No. 5.

Mr. Moody: The same objection.

The Court: The same ruling; objection sustained.

Mr. Stone: Exception. Ex. 15.

Q. By Mr. Stone: I show you correspondence for October and ask you to state if that is the correspondence of the office relating to the treatment of patients, that you wrote to?

A. Yes, sir.

Mr. Stone: I offer this in evidence as Defendant's Exhibit No. 6.

Mr. Moody: The same objection.

The Court: Sustained.

Mr. Stone: Exception. Ex. 16.

Q. By Mr. Stone: I will ask you to examine for November and state whether or not that is correspondence for that month.

A. Yes, sir.

(Testimony of Gideon M. Freeman.)

Mr. Stone: We offer this as Defendant's Exhibit No. 7.

Mr. Moody: The same objections.

The Court: Sustained.

Mr. Stone: Exception. Ex. 17.

Q. By Mr. Stone: For December, and ask you to examine that and state if that is the correspondence for that month; is it?

A. Yes, sir.

Mr. Stone: We offer this as Defendant's Exhibit No. 8.

Mr. Moody: I object to this last one.

The Court: Sustained.

Mr. Stone: Exception. Ex. 18.

The Court: Objected to on the same grounds?

Mr. Moody: The same grounds, the same objections.

(The letters included in Defendant's Exhibits Nos. 2 to 8, inclusive, are of the same tenor and effect as those in Defendant's Exhibit No. 1.)

Testimony of Dr. Gideon M. Freeman, Continued.

The rubber stamp spoken of was made when we were moving from the corner of Third and Spring streets to 327½ South Spring street, so that he could write a letter to each patient that had been on our books, or each patient who had written to us, a notice of removal, and the stamp was made to keep me from signing all those letters.

I never at any time authorized Mr. Sims or anyone else to sign that to a letter relating to the treatment

(Testimony of Gideon M. Freeman.)

of a patient and I never knew of its being used other than to send out removal notices. The Wasserman test was used by us. I would send the blood to the Wasserman laboratory to be tested, which is customary among physicians I think. I had this test made in a great number of cases. I never knew anything about this bottled material which has been here in evidence and never knew it came to the office, nor never knew of any report being made on it. Dr. Holsman was not at the office at the time of these decoy letters or a little time before or afterwards, that is, at no time except July and December of 1912, that I know of.

Cross-Examination.

I am a graduate from the medical department of Leland Stanford University in 1903. I am thirty-six and a half years old now and was born in 1880. I did some advertising prior to the time we moved to 327½ South Spring street. I never did any advertising prior to the time I went to work for Dr. Joslyn at 305½ South Spring street and it was the same people I worked for continuously, except there were additions to the firm. While I was at Fifth and Spring streets working for Dr. Joslyn he would send me an ad and I would change it over to suit the local conditions. I was there for about a year more or less and had the advertisements put in the paper. I had the advertisement that was introduced as United States Exhibit No. 2 placed in the paper. At the time this ad was being circulated the office was being run under my name. My father was a physician and I was in his office from the time I was twelve years old and helped treat a

(Testimony of Gideon M. Freeman.)

number of cases from time to time and also had experience when going to college and that gives a little over *thenty*-three or twenty-four years' experience. My father practiced the same line of specialty. My father allowed me to assist in the treatment of syphilis and gonorrhea at the age of twelve years. I received a salary and a commission upon the business transacted at the office here at Los Angeles and had letterheads such as are found in these exhibits made and am thoroughly familiar with the reading on the letterheads. I never intended to take any cases by mail. The reason I had put in the ad, "write your full symptoms, if you are unable to call," is simply because I wanted to get in touch with the patients the same as any business firm would do. I do not call that taking cases by mail. I did not intend to treat them by mail. If the patient confided enough in me to write his full symptoms and describe his condition, if he came to Los Angeles he would come to me before he went to someone else. I did not intend to take any action upon the symptoms described in the letter. By consultation by mail I meant I would advise the patient how to take care of himself until he called at the office. I have had no interest in the business at 327½ South Spring street and had no interest in the business conducted under my name up to the time I moved to the office at Third and Broadway. I can cure venereal warts by one treatment. There are a number of different things that it only takes one treatment to cure. I have cured syphilis in one treatment. I met one today I treated four years ago by the "606" treatment and he has taken no treat-

(Testimony of Gideon M. Freeman.)

ment since and has had four Wasserman tests made, one each year, and every one is absolutely negative, and he is in a perfectly healthy condition at the present time. This was done by one treatment of "606" and no follow up treatment. I would not say I have cured gonorrhea in one treatment, but I have cured varicocele in one treatment by an operation.

This rubber stamp was made, I think, about six weeks before we moved from 305½ South Spring street to 327½, that would be sometime around in June. I paid no attention to the rubber stamp from the time that it was made until I left the office at 327½ S. Spring, a little over a year. I then looked for it and could not find it.

I can cure varicocele without pain or knife, in some cases it can be cured by electricity. Varicocele is enlarged veins in the scrotum; and there is a method of tying up these veins. The other method is an operation in which scissors are used. I have performed fifteen hundred or two thousand of such operations and never have had any complaints, except in three or four instances. I was paid a regular salary and a commission on all the business alone, and was thoroughly familiar with all the business that was done in the office and all of the money taken in.

Mr. Simms was the manager in the office and the letterheads were free to anybody in the office. Mr. Sims was the general manager of the office; he did all except treat the patients; he received all the mail and wrote all the letters and took in the money, taking care of it, and attended to the drugs. I do not know what

(Testimony of Gideon M. Freeman.)

become of Sims, he ran away before the indictment was out. Mr. Sims did all of the typewriting, except for a short time there was a stenographer employed to assist on those letters, and attend to Dr. Giles' personal correspondence, and Miss Wilhelm was this stenographer. Dr. Joslyn is dead.

C. E. Webster, Recalled.

Whereupon he was asked by counsel for the defendants if a detective for the medical board did not assist him and bring to his knowledge the facts upon which this prosecution was brought and assisted him in getting the evidence (McDonnell, a witness having been subpoenaed by the government, but not placed on the witness stand, and being a detective for the state medical board) and the court sustained objection to this question, to which the defendants and each of them duly excepted. Ex. 19.

Thereupon the government and the defendant rested the case and the defendant requested the court to instruct the jury as follows:

I.

"I instruct you in this case, that the gist of the allegations against the defendants is a conspiracy and the doing of an act or acts, to-wit, the mailing of letters set out in the indictment, in furtherance of the conspiracy.

You cannot find the defendants or either of them guilty of a conspiracy in the case, even though you believe such has existed as charged in the indictment, unless you further believe from the evidence, beyond a reasonable doubt, that the defendants or one of them

mailed, or caused to be mailed the letters, or one of the letters set out in the indictment, in furtherance of the alleged conspiracy; because a conspiracy under the United States laws is not a crime, though it is an agreement or understanding to do an unlawful act or acts, unless the overt act or one of them alleged in the indictment is actually committed by the defendant or one of the defendants after the conspiracy is formed and in furtherance thereof, and hence, unless you believe from the evidence in this case, beyond all reasonable doubt, that the defendants had entered into a conspiracy, as alleged in the indictment, and further, that the defendants, or one of them, in furtherance of said conspiracy actually mailed, or actually caused to be mailed, the letters, or one of them, set out in the indictment, then it would be your duty to acquit the defendants."

II.

"I instruct you, that unless you believe from the evidence, beyond a reasonable doubt, that the defendants conspired together as alleged in the indictment, in devising a scheme to defraud, and knowingly used the mails in furtherance thereof, then no statement or act of either defendant should be considered against any other defendant, or defendants in determining whether or not there was a conspiracy as charged in the indictment. That is to say, before the act or acts of any defendant can be used or considered against another defendant or defendants, it must first appear beyond a reasonable doubt that the conspiracy existed, as alleged in the indictment."

III.

"I instruct you, that under the law what is known as decoy evidence, such as the sending of the two letters set out in the indictment, by the postoffice inspector, for the purpose of procuring an answer from the defendant, or one of them, may be used for the purpose of apprehending or ascertaining whether a person is engaged in the commission of a criminal offense against the laws of the United States. But in this charge of conspiracy, unless you believe from the evidence beyond a reasonable doubt, that at the time the said decoy letter or letters were mailed to the defendants or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment; or unless the defendants had conspired together, as alleged in the indictment at the time of or before the sending said letter or letters by the postoffice inspector, then the evidence of said decoy letters is not alone sufficient upon which to base the verdict of guilty, because a government official cannot conspire with another person to violate the laws of the United States and it is against public policy for a government official to suggest or originate a conspiracy or any other crime, and hence, if you believe from the evidence in this case that a conspiracy as alleged, was suggested and planned by the postoffice inspector, or inspectors, and the defendants were not actually in said conspiracy as alleged, except as shown by a response to the letters of said postoffice inspector, then it will be your duty to acquit the defendants."

IV.

"I instruct you that it is against the policy of the laws of the United States to sustain a prosecution or conviction upon an indictment charging a conspiracy against the laws of the United States if the conspiracy or plan originated solely in the mind or minds of the government officials, and hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendants at the time alleged in the indictment had formed a conspiracy as therein alleged, without the suggestion and origination of the same by the postoffice inspector, or inspectors, and independent thereof, then it will be your duty to acquit the defendants."

V.

"I instruct you that ~~while~~ it may be proper under the laws of the United States for a government officer to use decoy methods in apprehending crime, that is, to ascertain whether or not a person, or persons are actually engaged in an offense against the laws of the United States, nevertheless, the evidence, if any, or the facts or circumstances, if any, procured by said decoy method can only be considered by you in determining the question as to whether or not the defendants had actually entered into the conspiracy as charged in the indictment, and any fact, or facts, or circumstances acquired by said decoy letters are not of themselves sufficient to sustain a verdict of guilty unless you believe from the evidence beyond a reasonable doubt that the defendants had, independent of said decoy letters, entered into the conspiracy at the time and place as alleged in the indictment."

VI.

"I instruct you that unless you believe from the evidence beyond a reasonable doubt in this case, that the defendants or one of them actually mailed or actually caused to be mailed the letters or one of them, set out in the indictment, then it will be your duty to acquit the defendants, because unless the defendants, or one of them knew of, or in some way authorized the mailing of the letter, or letters set out in the indictment, then the defendants would not be guilty, regardless of whether or not you may believe there was, or was not, a conspiracy between them."

VII.

"I instruct you that a person cannot, as the agent or employee of another in any business, bind his employer in a criminal proceeding or charge, and his employer is not responsible for the acts of the employee in committing a criminal offense, unless you believe from the evidence beyond a reasonable doubt, that the employer in some way knew of the act or acts of the employee, alleged to be criminal, or in some way authorized the act or acts of the employee; and hence, unless you believe from the evidence, beyond a reasonable doubt, that the defendants in some way knew of, or intentionally authorized the mailing of the letter or letters set out in the indictment, then it will be your duty to acquit the defendants."

VIII.

"I instruct you that before you can find a verdict of guilty against the defendants in this case, that you must find that all of the following conditions exist:

(a) That there was a conspiracy between them, as alleged in the indictment.

(b) That the object of that conspiracy was that the said defendants should devise a scheme or plan to defraud the persons, as alleged in the indictment, and

(c) That said defendants intended the use of the United States mails in carrying out or in the furthering of the object of such conspiracy.

And it is necessary before you are authorized to find a verdict of guilty in this case, that you believe all of the above elements to exist in this case. It is not sufficient that one of them exist, but they all must have existed, as alleged in the indictment, and to your satisfaction, beyond a reasonable doubt, before you are authorized to convict the defendants."

IX.

"I instruct you that the principal or master is not criminally liable for the acts of his agent or servant even though done in the general course of his employment, unless such acts of the agent or servant are authorized or consented to by the principal or master and that no authority to do a criminal act will be presumed. Hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Holsman, actually mailed the letter or letters set out in the indictment, or caused the same to be mailed, or in some way knowingly authorized or acquiesced in the mailing thereof in furtherance of the scheme as charged in the indictment, then it will be your duty to acquit him, even though you may believe from the evidence that the defendant Sims was employed by the defendants to care for the correspondence and answer-

ing letters, even though you believe that the answering of letters by the defendant Sims was in the course of his employment."

X.

"I instruct you that under this charge of conspiracy, before you are authorized to convict the defendants, or either of them, you must believe beyond a reasonable doubt, that they had an understanding or agreement between or among themselves to defraud any and all persons who could be induced to write to them as charged in the indictment. And further, as a part of said conspiracy they intended the use of the mails in furtherance of said conspiracy.

The first question for you to consider is, was there a conspiracy? That is to say, did the defendants conspire or agree together and between or among themselves to commit the offense against the United States, as charged in the indictment? And, in the next place, did they enter into an agreement, or plan by which it was agreed or understood between or among themselves that they would defraud any and all persons, as charged in the indictment? And, in the next place, did they knowingly or intentionally mail, or cause to be mailed either of the letters charged in the indictment?

Before you are authorized to convict the defendants or either of them, you must believe beyond a reasonable doubt, that they intended to defraud in the manner and by the use of the means set out in the indictment.

If the defendants, acting as specialists in the treatment of diseases acted in good faith and honestly believed in the representations which they made, if any, and did not by any of their said acts, as charged in the

indictment, intend to defraud any person or persons, then it is your duty to acquit the defendants."

XI.

"I instruct you that though you may believe from the evidence that the defendant Holsman was financially interested in the office conducted at Los Angeles at the time alleged in the indictment, yet unless you believe from the evidence beyond a reasonable doubt, that he knew of or consented to or in some way authorized the mailing of the letters or one of them set out in the indictment, then you cannot convict him, and it will be your duty to find a verdict of not guilty as to him."

To the refusal to give the foregoing instructions and each of them the defendants and each of them duly excepted. Ex. 20-30 inclusive.

Thereupon the court of its own motion and over the objections of the defendants and each of them instructed the jury as follows:

I.

"Gentlemen of the Jury:

The indictment in this case was brought under sections 37 and 215 of the United States Criminal Code, the former section being, in substance, as follows:

"If two or more persons conspire * * * to commit an offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be "punished as prescribed in said section."

II.

The offense which it is alleged the defendants con-

spired to commit was a violation of said section 215, which is, in substance, as follows:

“Whoever having devised, or intending to devise, any scheme or artifice to defraud * * * shall, for the purpose of executing said scheme or artifice, or attempting so to do, place or cause to be placed, any letter * * * in any postoffice * * * of the United States * * * to be sent or delivered by the postoffice establishment of the United States, shall be punished” as in said section prescribed.

III.

The indictment in this case is against Charles K. Holsman, Henry L. Giles, Gideon M. Freeman, Ambrose C. Sims and Otto C. Joslin (since deceased). Only two of the defendants indicted, namely—Charles K. Holsman and Gideon M. Freeman, are now on trial. There being five persons named in the conspiracy, it is not necessary for the government to show that both Holsman and Freeman are guilty. That is to say, it is not necessary to show that they conspired together. It is sufficient to show that they or either of them conspired with any of the other defendants. It is necessary, of course, that two persons be in a conspiracy. Therefore, you can convict either one or both of the defendants on trial, and the instructions hereafter, when they refer to and speak of defendants, refer to either of the defendants. Before you can convict either of the defendants it must be shown that he conspired with one of the other defendants named in the indictment.

IV.

The charge against the defendants on trial, compre-

hensively stated, is that they conspired together or with one of the other persons named in the indictment, first to devise a scheme to defraud, and that they did devise such scheme to defraud as set out in the indictment, and, second, that they likewise conspired to place or cause to be placed in the postoffice of the United States, at the city of Los Angeles, California, letters addressed to persons intended to be so defrauded, to be sent and delivered to said persons by the postoffice establishment of the United States for the purpose of executing said scheme or attempting so to do, and, third, that the defendants for the purpose of effecting and executing said scheme, or attempting so to do, placed or caused to be placed in said postoffice, one of the letters set forth in the indictment. Said conspiracy and scheme are fully set forth and described in the indictment which has been read to you and will, if you desire it, be with you in the jury room; therefore, it need not be restated here.

The defendants on trial, of course, cannot be convicted except upon proof of the particular charge stated in the indictment, and the evidence in the case should satisfy your minds that a scheme to defraud was devised as set forth, and that part of the scheme was to use the mails as described in the indictment.

V.

You will observe that the offense charged against the defendants is not that of using the mails, in execution of a fraudulent scheme, but of conspiracy to so use the mails.

VI.

You will be called upon to consider, among others, the following questions:

Was there such a conspiracy, as alleged in the indictment? And did the defendants for the purpose of effecting the objects of the conspiracy, place or cause to be placed in said postoffice, to be sent and delivered by mail, the letters described in the indictment, or either of them?

If the evidence satisfies you beyond a reasonable doubt of the existence of said conspiracy, and that defendants, for the purpose of effecting the objects of said conspiracy, placed or caused to be placed in said postoffice, to be sent and delivered by mail, said letters, or either of them, you will find the defendants guilty as charged in the indictment. If, however, the evidence fails to so satisfy you of the existence of said conspiracy, or that defendants, for the purpose of effecting the objects of said conspiracy, placed or caused to be placed either of said letters in said postoffice, to be sent and delivered by mail, you will find defendants not guilty.

VII.

The court further instructs you that a conspiracy is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means.

From this definition of conspiracy it follows, of course, that there can be no conspiracy where one individual acts by or for himself only.

A mere mental purpose cannot justify a conviction

of conspiracy. A common design is of the essence of the charge

A person, therefore, in order to become a party to a conspiracy, must combine with someone else to effect the objects of the conspiracy by the means agreed upon.

VIII.

The court further instructs you that, to constitute a conspiracy it is not necessary that there should be an explicit or formal agreement between the alleged conspirators.

Though the common design is of the essence of the charge it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view of attaining the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.

The evidence in proof of a conspiracy may be, and from the nature of the case generally will be, circumstantial.

The court, however, further instructs you that, where circumstantial evidence is relied upon to establish the conspiracy, or any other fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy, or other fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that

the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

IX.

You are further instructed, with reference to the proof of mailing the letters set up in the indictment, that it is not essential to the commission of the offense charged, that such letters be deposited in the mail by the defendants themselves, or even by another acting under their express direction, because a person is equally responsible for the mailing of any particular letter if it is deposited in the postoffice as a natural or probable consequence of any act intentionally done by such person with knowledge at the time thereof that such act will naturally and probably result in the mailing of such letter.

You are further instructed that a person is responsible for the mailing of any letter if he sets in operation and makes use of any agency which, as he knows at the time, would according to its established and regular course, carry such letter through the mail to the person or persons to whose attention he designed such letter should be brought.

X.

The court further instructs you that, while the acts or declarations of a co-conspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during the existence and in furtherance of the unlawful combination when proven, is not only evidence against him, but is evidence against the other conspirator who, if the combination be proved, is as much responsible for such act or declaration as if done or made by himself.

You must not, however, permit yourselves to use against either defendant, anything said or done outside the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt, that at the time the things were said or done a conspiracy existed between the party saying or doing the things and the defendant to be effected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy.

XI.

You are further instructed that the official postmark of the Los Angeles postoffice on the envelope enclosing one of the letters set forth in the indictment, and which has been introduced in evidence, is *prima facie* proof that said letter was mailed at said postoffice.

XII.

It is lawful that what is known as decoy letters, such as the letters sent by the postoffice inspector in this case for the purpose of procuring an answer from the defendants, or one of them, may be used for the purpose of ascertaining whether the person addressed is engaged in the commission of a criminal offense against the laws of the United States. If at the time the said decoy letter or letters were mailed to the defendants, or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment, and the said defendants in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then

the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy.

A government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime. The conspiracy with which the defendants are charged must be proven to exist independently of any inducement to enter therein by any government official. In other words, if the conspiracy existed, it does not matter what the government officers did in order to procure evidence to prove it.

XIII.

It is admitted by the government in this case that each of the letters set out in the indictment and alleged therein to be the overt acts pursuant to the accomplishment of the purpose of the conspiracy alleged in the indictment, were received by the addressees therein respectively in reply to letters respectively addressed to the defendant G. M. Freeman, M. D., either by a United States postal inspector, or by another procured by the inspector so to do, and that the letters addressed to said defendant were addressed to him for the purpose of giving to the government information as to whether or not the defendants charged in the indictment were engaged in an unlawful use of the mails. These letters so addressed to said defendants may be properly designated as decoy letters. You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action. You are further instructed that a government officer suspecting that a person or per-

sons may be engaged in a business in violation of the laws of the United States, has a right to seek information under an assumed name, directly from such person or persons so suspected. That if such suspected person or persons respond to such inquiry for such information, and by so responding violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official.

XIX.

The court further instructs you that you are the sole judges of the facts and credibility of witnesses, and, in passing upon the credibility of witnesses you may consider, together with all the evidence in the case, their intelligence or lack thereof; their relation to the controversy and to the parties; the interest, if any, they have in the result of the trial; their prejudices and motives; their hopes and fears; their bias or impartiality; the reasonableness or otherwise of the statements they make—together with their manner upon the witness stand, and should give to their testimony such weight as you believe it entitled to receive.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter here involved, the jury may distrust his testimony in other respects, and are at liberty to reject the whole or any part of it.

XX.

The court further instructs you that the law permits a defendant, at his own request, to testify in his own behalf.

The defendant Freeman has availed himself of this privilege, and his testimony is to be treated like the testimony of any other witness—that is, it is for you to say, remembering his testimony, his demeanor on the witness stand, his interest in the result of the trial, together with all the evidence in the case, whether or not he has told the truth.

XXI.

You are instructed that you are not to consider the failure of any defendant to take the witness stand as having any bearing whatever on the question of his guilt or innocence, and you should not allow the fact that any defendant has failed to testify in his own behalf to influence you in the slightest degree.

XXII.

I instruct you that it is not a violation of the laws of the United States for a physician to advertise in his profession or to advertise his method of treatment. You are not to be influenced and must not be influenced to any extent in the consideration of this case by prejudice, if any should come into your minds, against a professional man advertising.

XXIII.

The court further instructs you that neither the finding of an indictment, nor any allegation thereof, raises any presumption whatever of the defendant's guilt, but the burden of proof is upon the government, and that the law presumes the defendant innocent until proven

guilty beyond a reasonable doubt, and that this rule applies to every material element of the offense charged. The court further instructs you that a reasonable doubt is a doubt which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

XXIV.

You are instructed that a defendant in a criminal case is entitled to the individual opinion of each member of the jury, and that no member of the jury should vote for a conviction of such defendant because of the opinion of the other members of the jury, so long as he has a reasonable doubt as to the guilt of such defendant, but this does not mean that you should not consult together and try and agree upon a verdict.

To the giving of the aforesaid instructions and each of them the defendants and each of them duly excepted. Ex. 31-54 inclusive.

Thereafter, to wit, on the first day of December, 1916, the jury in the above entitled cause returned into open court the following verdict:

*"In the District Court of the United States, in and for
the Southern District of California, Southern Di-
vision.*

No. 903 Crim.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

CHAS. K. HOLSMAN and GIDEON M. FREE-
MAN,

Defendants.

We, the jury in the above entitled cause, find the
defendant, Chas. K. Holsman, guilty as charged in the
indictment, and the defendant, Gideon M. Freeman,
guilty as charged in the indictment, with recommenda-
tion of leniency for both.

Los Angeles, California, December 1, 1916.

C. T. BRADFORD,

Foreman."

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON M. FREE-
MAN,

Defendants.

STIPULATION.

It is hereby stipulated that the foregoing constitutes
a true and correct bill of exceptions of the above en-

titled cause and that the same be settled and signed as such by the judge who tried the same.

Dated this March 15th, 1917.

ALBERT SCHOONOVER,
United States Attorney;
By W. F. Palmer,
Assistant U. S. Attorney.

DUKE STONE,
Attorney for Charles K. Holsman.
MACK MEADER,
Attorney for Gideon M. Freeman.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON M. FREEMAN,

Defendants.

CERTIFICATE ON STIPULATION.

The foregoing bill of exceptions containing all the evidence offered and introduced at the trial of said cause necessary to a review of said cause on this appeal in accordance with the stipulation of counsel for plaintiff and defendant; and the instruction of the court to the jury with the defendants' exceptions thereto and the offered instructions on the part of the defendants and each of them refused and the exceptions thereto, and all of the proceedings at the trial of said cause, includ-

ing the verdict of the jury, and is a true and correct bill of exceptions and is hereby settled and allowed and ordered to be filed as such.

Dated this March 16th, 1917.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Case No. 903 Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman and Gideon M. Freeman, defendants. Bill of exceptions on behalf of defendants Charles K. Holsman and Gideon M. Freeman. Filed Mar. 16, 1917, at 10 min. past 10 o'clock a. m. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Duke Stone and Mack Meader, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for defendants.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON M. FREEMAN,

Defendants.

**Order Extending Time in Which to Prepare and
Serve Proposed Bill of Exceptions.**

On this January 12, 1917, the same being within ten days from the date of judgment and sentence in the

above entitled cause, on application of attorneys for the defendants and no previous extension having been granted and good cause appearing therefor: It is ordered that the defendants may have to and including the 12th day of March, 1917, within which to prepare and serve their proposed bill of exceptions to be used in this cause on writ of error; and the time for the said preparing and serving of the same is hereby extended to and including said date.

Dated this January 12th, 1917.

OSCAR A. TRIPPET,

United States District Judge.

We consent to this extension.

W. F. PALMER,

Asst. U. S. Atty.

[Endorsed]: Original. Case No. 903 Criminal. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman and Gideon M. Freeman, defendants. Order extending time in which to prepare and serve proposed bill of exceptions. Filed Jan. 12, 1917, at 15 min. past 3 o'clock p. m. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Duke Stone and Mack Meader, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for defendants.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON M. FREE-
MAN,

Defendants.

Petition for Writ of Error.

Your petitioners, Charles K. Holsman and Gideon M. Freeman, defendants in the above-entitled cause, bring this petition for a writ of error to the District Court of the United States, in and for the Southern District of California, Southern Division, and in that behalf your petitioners say:

That on the 5th day of January, 1917, there was made, given, rendered and entered in the above-entitled court and cause judgment against your petitioners wherein and whereby your petitioner, Charles K. Holsman, was sentenced to be imprisoned for three months in the county jail of the county of Los Angeles, California, and to pay a fine of fifteen hundred (\$1500.00) dollars, and imprisoned until said fine is paid, and your petitioner, Gideon M. Freeman, was sentenced to pay a fine of fifteen hundred (\$1500.00) dollars, and imprisoned until said fine is paid in the county jail of Los Angeles county, California; and your petitioners say that they are and each of them are advised by counsel, and they and each of them aver that there

was and is manifest error in the records and proceedings had in such cause and in the making, giving, rendition and entry of such judgment and sentence, to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of the said record, and by an examination of the bill of exceptions by your petitioners to be tendered and filed, and in the assignment of errors hereinafter set out, and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals, Ninth Circuit, your petitioners now pray that a writ of error may be issued directed therefrom to the said District Court of the United States for the Southern District of California, Southern Division, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners.

And your petitioners now make the assignment of errors filed herewith upon which they will rely and which will be made to appear by return of said record in obedience to said writ.

Wherefore, your petitioners pray the issuance of the writ as herein prayed, and pray that the assignment of errors filed herewith may be considered as their assignment of errors upon the writ, and that the judgment rendered in this cause may be reversed and held

for naught and that said cause be remanded for further proceedings and that they be awarded a supersedeas upon said judgment, and all necessary processes, including bail.

DUKE STONE and
MACK MEADER,

Attorneys for Defendants Charles K. Holsman and
Gideon M. Freeman.

[Endorsed]: Case No. 903 Criminal. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman and Gideon M. Freeman, defendants. Petition for writ of error. Filed Jan. 10, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for defendants.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON M. FREEMAN,

Defendants.

Assignment of Errors.

Charles K. Holsman and Gideon M. Freeman, defendants in the above entitled cause, and plaintiffs in error herein having petitioned for an order from said

court permitting them to procure a writ of error from this court directed to the United States Circuit Court of Appeals, Ninth Circuit, from the judgment and sentence made and entered in said cause against said plaintiffs in error, and petitioners herein, now make and file with their said petition the following assignment of errors herein, which they aver occurred on the trial of said cause, and upon which they will rely for a reversal of said judgment and sentence upon the said writ, and which said errors and each and every one of them are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon them by law; and they say that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to-wit:

I.

The court erred in admitting in evidence against the defendant Charles K. Holsman over said defendant's objection the Government's Exhibit Number (1-a), the same being an affidavit of Gideon M. Freeman, dated September 8th, 1911, and which in substance stated that the defendant Charles K. Holsman was practicing medicine at 305½ South Spring street on said date, to which admission said defendant, Charles K. Holsman, duly excepted.

II.

The court erred in admitting in evidence said affidavit against the defendant, Gideon M. Freeman, to the admission of which said defendant duly excepted.

III.

The court erred in not admitting in evidence Defendant's Exhibits Number (1), (2), (3), (4), (5), (6), (7) and (8), for which the proper foundation had been duly laid by the defendant, Gideon M. Freeman, while on the witness stand, and which exhibits consisted of the correspondence from the office of the defendants from May 1st, 1913, to January 1st, 1914, and being the copies of the letters sent out from the office of the defendants over said period of time to various patients of the defendants and the answers of said patients or persons seeking treatment from said defendants, and being all the correspondence of said defendants or either of them covering said period of time and obtainable with reference to the conduct of their business as far as the same related to the use of the mails, which said letters show the character and conduct of defendant's business relating to the use of the mails and to the refusal to admit said letters and each of them said defendants and each of them duly excepted.

IV.

The court erred in admitting in evidence over the objection of the defendants and each of them, Government's Exhibits Number and , the same being two large bound volumes consisting of the complete files of the Los Angeles Examiner and purporting to contain certain advertisements of the defendant, Gideon M. Freeman, and which said publications were for the months of July and August, 1912, to which admission the defendants and each of them duly excepted.

V.

The court erred in refusing to instruct the jury as requested on behalf of said defendants, and being in words as follows:

I.

"I instruct you in this case, that the gist of the allegations against the defendants is a conspiracy and the doing of an act or acts, to-wit, the mailing of letters set out in the indictment, in furtherance of the conspiracy.

You cannot find the defendants or either of them guilty of a conspiracy in this case, even though you believe such has existed as charged in the indictment, unless you further believe from the evidence, beyond a reasonable doubt, that the defendants or one of them mailed, or caused to be mailed the letters, or one of the letters set out in the indictment, in furtherance of the alleged conspiracy; because a conspiracy under the United States laws is not a crime, though it is an agreement or understanding to do an unlawful act or acts, unless the overt act or one of them alleged in the indictment is actually committed by the defendants or one of the defendants after the conspiracy is formed and in furtherance thereof, and hence, unless you believe from the evidence in this case, beyond all reasonable doubt, that the defendants had entered into a conspiracy, as alleged in the indictment, and further, that the defendants, or one of them, in furtherance of said conspiracy actually mailed, or actually caused to be mailed, the letters, or one of them, set out in the indictment, then it would be your duty to acquit the defendants."

II.

"I instruct you, that unless you believe from the evidence, beyond a reasonable doubt, that the defendants conspired together as alleged in the indictment, in devising a scheme to defraud, and knowingly used the mails in furtherance thereof, then no statement or act of either defendant should be considered against any other defendant, or defendants in determining whether or not there was a conspiracy as charged in the indictment. That is to say, before the act or acts of any defendant can be used or considered against another defendant or defendants, it must first appear beyond a reasonable doubt that the conspiracy existed, as alleged in the indictment."

III.

"I instruct you, that under the law what is known as decoy evidence, such as the sending of the two letters set out in the indictment, by the postoffice inspector, for the purpose of procuring an answer from the defendant, or one of them, may be used for the purpose of apprehending or ascertaining whether a person is engaged in the commission of a criminal offense against the laws of the United States. But in this charge of conspiracy, unless you believe from the evidence beyond a reasonable doubt, that at the time the said decoy letter or letters were mailed to the defendants or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment: or unless the defendants had conspired together, as alleged in the indictment at the time of or before the sending said letter or letters by the postoffice inspector, then the evidence of said decoy letters is not alone sufficient

upon which to base the verdict of guilty, because a government official cannot conspire with another person to violate the laws of the United States and it is against public policy for a government official to suggest or originate a conspiracy or any other crime, and hence, if you believe from the evidence in this case that a conspiracy as alleged, was suggested and planned by the postoffice inspector, or inspectors, and the defendants were not actually in said conspiracy as alleged, except as shown by a response to the letters of said postoffice inspector, then it will be your duty to acquit the defendants."

IV.

"I instruct you that it is against the policy of the laws of the United States to sustain a prosecution or conviction upon an indictment charging a conspiracy against the laws of the United States if the conspiracy or plan originated solely in the mind or minds of the government officials, and hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendants at the time alleged in the indictment had formed a conspiracy as therein alleged, without the suggestion and origination of the same by the postoffice inspector, or inspectors, and independent thereof, then it will be your duty to acquit the defendants."

V.

"I instruct you that while it may be proper under the laws of the United States for a government officer to use decoy methods in apprehending crime, that is, to ascertain whether or not a person, or persons are actually engaged in an offense against the laws of the

United States, nevertheless, the evidence, if any, or the facts or circumstances, if any, procured by said decoy method can only be considered by you in determining the question as to whether or not the defendants had actually entered into the conspiracy as charged in the indictment, and any fact, or facts, or circumstances acquired by said decoy letters are not of themselves sufficient to sustain a verdict of guilty unless you believe from the evidence beyond a reasonable doubt that the defendants had, independent of said decoy letters, entered into the conspiracy at the time and place as alleged in the indictment."

VI.

"I instruct you that unless you believe from the evidence beyond a reasonable doubt in this case, that the defendants or one of them actually mailed or actually caused to be mailed the letters or one of them, set out in the indictment, then it will be your duty to acquit the defendants, because unless the defendants, or one of them knew of, or in some way authorized the mailing of the letter, or letters set out in the indictment, then the defendants would not be guilty, regardless of whether or not you may believe there was, or was not, a conspiracy between them."

VII.

"I instruct you that a person cannot, as the agent or employee of another in any business, bind his employer in a criminal proceeding or charge, and his employer is not responsible for the acts of the employee in committing a criminal offense, unless you believe from the evidence beyond a reasonable doubt, that the employer in some way knew of the act or acts of the employee,

alleged to be criminal, or in some way authorized the act or acts of the employee; and hence, unless you believe from the evidence, beyond a reasonable doubt, that the defendants in some way knew of, or intentionally authorized the mailing of the letter or letters set out in the indictment, then it will be your duty to acquit the defendants."

VIII.

"I instruct you that before you can find a verdict of guilty against the defendants in this case, that you must find that all of the following conditions exist:

(a) That there was a conspiracy between them, as alleged in the indictment.

(b) That the object of that conspiracy was that the said defendants should devise a scheme or plan to defraud the persons, as alleged in the indictment, and

(c) That said defendants intended the use of the United States mails in carrying out or in the furthering of the object of such conspiracy.

And it is necessary before you are authorized to find a verdict of guilty in this case, that you believe all of the above elements to exist in this case. It is not sufficient that one of them exist, but they all must have existed, as alleged in the indictment, and to your satisfaction, beyond a reasonable doubt, before you are authorized to convict the defendants."

IX.

"I instruct you that the principal or master is not criminally liable for the acts of his agent or servant even though done in the general course of his employment, unless such acts of the agent or servant are authorized or consented to by the principal or master and

that no authority to do a criminal act will be presumed. Hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Holsman, actually mailed the letter or letters set out in the indictment, or caused the same to be mailed, or in some way knowingly authorized or acquiesced in the mailing thereof in furtherance of the scheme as charged in the indictment, then it will be your duty to acquit him, even though you may believe from the evidence that the defendant Sims was employed by the defendants to care for the correspondence and answering letters, even though you believe that the answering of letters by the defendants Sims was in the course of his employment."

X.

"I instruct you that under this charge of conspiracy, before you are authorized to convict the defendants, or either of them, you must believe beyond a reasonable doubt, that they had an understanding or agreement between or among themselves to defraud any and all persons who could be induced to write to them as charged in the indictment. And further, as a part of said conspiracy they intended the use of the mails in furtherance of said conspiracy.

The first question for you to consider is, was there a conspiracy? That is to say, did the defendants conspire or agree together and between or among themselves to commit the offense against the United States, as charged in the indictment? And, in the next place, did they enter into an agreement, or plan by which it was agreed or understood between or among themselves that they would defraud any and all persons, as charged

in the indictment? And, in the next place, did they knowingly or intentionally mail, or cause to be mailed either of the letters charged in the indictment?

Before you are authorized to convict the defendants or either of them, you must believe beyond a reasonable doubt, that they intended to defraud in the manner and by the use of the means set out in the indictment.

If the defendants, acting as specialists in the treatment of diseases acted in good faith and honestly believed in the representations which they made, if any, and did not by any of their said acts, as charged in the indictment, intend to defraud any person or persons, then it is your duty to acquit the defendants."

XI.

"I instruct you that though you may believe from the evidence that the defendant Holsman was financially interested in the office conducted at Los Angeles at the times alleged in the indictment, yet unless you believe from the evidence beyond a reasonable doubt, that he knew of or consented to or in some way authorized the mailing of the letters or one of them set out in the indictment, then you cannot convict him, and it will be your duty to find a verdict of not guilty as to him."

To the giving of each of the instructions above mentioned the defendants and each of them duly excepted.

VI.

The court erred in instructing the jury over the defendant's objection and to each of which instructions the defendants and each of them duly excepted and which instructions are set out on pages 11 and 12 of the court's instructions and are as follows, to-wit:

Page 11.

"It is lawful that what is known as decoy letters, such as the letters sent by the postoffice inspector in this case for the purpose of procuring an answer from the defendants, or one of them, may be used for the purpose of ascertaining whether the person addressed is engaged in the commission of a criminal offense against the laws of the United States. If at the time the said decoy letter or letters were mailed to the defendants, or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment, and the said defendants in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy.

A government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime. The conspiracy with which the defendants are charged must be proven to exist independently of any inducement to enter therein by any government official. In other words, if the conspiracy existed, it does not matter what the government officers did in order to procure evidence to prove it."

Page 12.

“It is admitted by the government in this case that each of the letters set out in the indictment and alleged therein to be the overt acts pursuant to the accomplishment of the purpose of the conspiracy alleged in the indictment, were received by the addressees therein respectively in reply to letters respectively addressed to the defendant G. M. Freeman, M. D., either by a United States postal inspector, or by another procured by the inspector so to do, and that the letters so addressed to said defendant were addressed to him for the purpose of giving to the government information as to whether or not the defendants charged in the indictment were engaged in an unlawful use of the mails. These letters so addressed to said defendants may be properly designated as decoy letters. You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action. You are further instructed that a government officer suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has a right to seek information under an assumed name, directly from such person or persons so suspected. That if such suspected person or persons respond to such inquiry for such information, and by so responding violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been

made of him by the government official or through the procurement of the government official."

VII.

The defendants and each of them were prejudiced and their right of a fair trial prejudiced before the jury by reason of the statements of the assistant United States attorney during the trial of the cause in his comments on the evidence in which he stated that the letters offered in evidence were not decoy letters but were genuine letters and further that the defendants had been guilty of defrauding people or various people and persons and by other similar comments purporting to state certain facts which were never offered nor admitted in evidence, to which said statements and each of them the defendants and each of them then and there duly excepted and assigned the same as misconduct.

VIII.

The evidence offered on behalf of the government consisting alone of letters admitted to be decoy letters was wholly insufficient to sustain the verdict of the jury and the verdict and judgment are each contrary to law.

IX.

The court erred in not sustaining the motion of the defendants and each of them in arrest of judgment, to which the defendants and each of them duly excepted.

X.

The court erred in not sustaining the defendants' demurrer to the indictment herein and their motion to quash the same, to each of which the defendants and each of them duly excepted.

XI.

The court erred in refusing the defendants the right to show on cross-examination of the witness, Dr. Frank Fuller, as to how the office of the defendants was equipped for the treatment of patients and how the correspondence of the office was conducted; the said witness, Dr. Frank Fuller, having been questioned by the government about his knowledge of the office and the correspondence at the time he was employed in the office, to which rulings the defendants and each of them at the time duly excepted.

XII.

The court erred in sustaining the objection of government's counsel to the questions asked Dr. Whitman by defendants' counsel on cross-examination relating to the methods of the treatment of diseases about which he qualified as an expert witness.

Respectfully submitted,

DUKE STONE and
MACK MEADER,

Attorneys for the Defendants.

[Endorsed]: Original. Case No. 903 Criminal. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman and Gideon M. Freeman, defendants. Assignment of error. Filed Jan. 10, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Mack Meader and Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F 2132. Attorneys for defendants.

*In the District Court of the United States, Southern
District of California, Southern Division.*

Case No. 903 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN and GIDEON M. FREEMAN,

Defendants.

**Order Allowing Writ of Error and Admitting
Defendants to Bail.**

On this 10 day of January, 1917, came the defendants Charles K. Holsman and Gideon M. Freeman, by their attorneys, Duke Stone and Mack Meader, and presented to the court their petition heretofore filed herein, praying for the allowance of a writ of error and assignment of errors, intended to be urged by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, it is ordered that said petition be, and the same is hereby allowed and granted, and that a writ of error be, and the same is hereby allowed in said cause, and returnable before the said United States Circuit Court of Appeals for the Ninth Judicial Circuit, on the 9th day of Feb'y, A. D. 1917, and that a transcript of the record and of all the proceedings and papers on which the judgment was made

and entered in this cause shall be made and transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and said writ shall operate as a supersedeas and stay of execution.

And it appearing that the United States attorney has no objection, it is further ordered that the defendant, Charles K. Holsman, be admitted to bail pending said writ of error, in the sum of three thousand (\$3000.00) dollars, conditioned as the law directs, and that the defendant, Gideon M. Freeman, be admitted to bail pending said writ of error, in the sum of three thousand (\$3000.00) dollars, conditioned as the law directs; and

It is hereby further ordered that each of the undertakings, now tendered by each of said defendants, be, and the same are, and each of them is, hereby approved as the undertakings on writ of error herein, and also as such bail bonds.

Done this 10 day of January, 1917.

OSCAR A. TRIPPET,

District Judge.

[Endorsed]: Original. Case No. 903 Criminal. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Charles K. Holsman and Gideon M. Freeman, defendants. Order allowing writ of error and admitting defendants to bail. Filed Jan. 10, 1917, at 30 min. past 11 o'clock a. m. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for defendants.

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES K. HOLSMAN, *et al.*,

Defendants.

Supersedeas Bond of Charles K. Holsman.

Know All Men by These Presents: That we, Charles K. Holsman, as principal, and Charles K. Holsman and M. B. Ansel & M. Newman, as sureties, are held and firmly bound to the United States of America in the full sum of \$3000.00 (three thousand dollars), lawful money of the United States, to be paid to the United States, and the further sum of \$300.00, lawful money of the United States, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 8th day of January, 1917.

Whereas, lately at the term of the District Court of the United States for the Southern District of California, Southern Division, in the suit pending in the said court between the United States of America, plaintiff, and said Charles K. Holsman, defendant, judgment and sentence was given, made and rendered and entered against said Charles K. Holsman, and the said Charles K. Holsman is about to apply for a writ of error from

United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to terms and at or within the time to be fixed in said citation, which said citation shall be duly issued and served within the time provided by law, now, the condition of the above application is such that if upon the issuance of such writ and the service of such citation, as aforesaid, the said Charles K. Holsman shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in the said court and prosecute his writ of error, and if the said Charles K. Holsman shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of such judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said court provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth

Circuit then this obligation to be void; otherwise to remain in full force, virtue and effect.

CHARLES K. HOLSMAN,
Principal.

M. B. ANSEL.

M. NEWMAN.

Acknowledged before me the day and year first above written.

(Seal)

THOS. E. HAYDEN,

U. S. Commissioner, North. Dist. of Calif.

State of California, County San Francisco—ss.

M. B. Ansel and M. Newman, being duly sworn, each for himself deposes and says: That he is a householder in said county and state and is worth the sum of \$6600.00, exclusive of property exempt from execution and over and above all debts and liabilities.

M. B. ANSEL.

M. NEWMAN.

Subscribed and sworn to before me this 8th day of January, 1917.

(Seal)

THOMAS E. HAYDEN,

United States Commissioner,

Notary Public in and for the County of San Francisco,
State of California.

Approved 1/10/17.

TRIPPET,

Judge.

Department of Justice.

Office of United States Attorney for the Northern District of California, San Francisco.

Terms of court: U. S. Circuit Court of Appeals:
At San Francisco—First Mondays in October, Febru-

ary and May. U. S. District Court: At San Francisco—First Monday in March; second Monday in July; first Monday in November. At Sacramento—First Mondays in April. At Eureka—Third Monday in July.

January 8, 1917.

Albert Schoonover, Esq.,
United States Attorney,
Los Angeles, California.

Dear Sir:

I have examined the sureties M. B. Ansel and M. Newman who qualified before Commissioner Thomas E. Hayden on January 8, 1917, on the bond of Charles K. Holsman, in the case of United States of America, plaintiff, vs. Charles K. Holsman, *et al.*, defendants, No. 903 Criminal, in your District, Southern Division, and certify that in my opinion the said sureties are good and sufficient sureties for the amount of the bond

Respectfully,

JOHN W. PRESTON,
United States Attorney.

MA T/J.

[Endorsed]: Case No. 903 Crim. In the District Court of the United States, Southern District of California. Southern Division. United States of America, plaintiff, vs. Charles K. Holsman, *et al.*, defendants. Supersedeas bond of Charles K. Holsman. Filed Jan. 10, 1917, at 25 min. past 11 o'clock a. m. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Duke Stone, 434-436-438 Merchants Nat'l Bank Bldg., Los Angeles, California. Phone: F-2132. Attorney for said defendant.

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 903 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIDEON M. FREEMAN, *et al.*,

Defendants.

Supersedeas Bond of Gideon M. Freeman.

Know All Men by These Presents: That we, Gideon M. Freeman, as principal, and Charles W. Rand and Joseph Risk, as sureties, are held and firmly bound to the United States of America in the full sum of \$3000.00, lawful money of the United States, to be paid to the United States, and the further sum of \$300.00, lawful money of the United States, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of January, 1917.

Whereas, lately at the term of the District Court of the United States for the Southern District of California, Southern Division, in the suit pending in the said court between the United States of America, plaintiff, and said Gideon M. Freeman, defendant, judgment and sentence was given, made and rendered and entered against said Gideon M. Freeman, and the said

Gideon M. Freeman is about to apply for a writ of error from United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to terms and at or within the time to be fixed in said citation, which said citation shall be duly issued and served within the time provided by law, now, the condition of the above application is such that if upon the issuance of such writ and the service of such citation, as aforesaid, the said Gideon M. Freeman shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in the said court and prosecute his writ of error, and if the said Gideon M. Freeman shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of such judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said court provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit then this obli-

gation to be void; otherwise to remain in full force, virtue and effect.

GIDEON M. FREEMAN,
Principal.

CHARLES W. RAND.

JOSEPH RISK.

State of California, County of—ss.

Charles W. Rand and Joseph Risk, being duly sworn, each for himself deposes and says: That he is a householder in said district and is worth the sum of \$6600.00, exclusive of property exempt from execution and over and above all debts and liabilities.

CHARLES W. RAND.

JOSEPH RISK.

Subscribed and sworn to before me this 9th day of January, 1917.

(Seal)

D. M. HAMMACK,

United States Commissioner, Southern District of California.

Approved 1/10/17.

TRIPPET,

Judge.

[Endorsed]: Case No. 903 Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, plaintiff, vs. Gideon M. Freeman, *et al.*, defendant. Supersedeas bond of Gideon M. Freeman. Filed Jan. 10, 1917, at 25 min. past 11 o'clock a. m. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Mack Meader, Los Angeles, California. Phone: F-2132. Attorney for said defendant.

United States of America.

*District Court of the United States, Southern District
of California.*

Clerk's Office, No. 903.

Praeceptum.

To the Clerk of Said Court:

Sir:

Please issue transcript on writ of error to contain the following:

1. Bill of exceptions in full.
2. Judgment roll.
3. Citation (on writ of error).
4. Writ of error.
5. Order allowing writ of error.
6. Petition for writ of error.
7. Assignment of error.
8. Order extending time to prepare & serve proposed bill of exceptions.
9. And any and all papers, documents & records necessary to present a complete record on appeal.

DUKE STONE.

[Endorsed]: No. 903. U. S. District Court, Southern District of California, Southern Division. United States vs. Chas. K. Holsman *et al.*, defts. Praeceptum for transcript on writ of error. Filed May 9, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk.

No. 3015

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,	}
<i>Appellee,</i>	
<i>vs.</i>	
Charles K. Holsman, et al.,	}
<i>Appellants.</i>	

APPELLANTS' OPENING BRIEF.

Filed

SEP 18 1917

F. D. Monckton,
DUKE STONE, *Clerk*
MACK MEADER and
RALPH WOODS PONTIUS,
Attorneys for Appellants.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,	}
<i>Appellee,</i>	
<i>vs.</i>	
Charles K. Holsman, et al.,	
<i>Appellants.</i>	}

APPELLANTS' OPENING BRIEF.

STATEMENT OF THIS CASE.

This is an appeal by the defendants Charles K. Holsman and Gideon M. Freeman from a judgment and verdict of conviction, the prosecution being instituted under section 37 of the United States Penal Code, the charge being a conspiracy to violate section 215 of the United States Penal Code, that is, a conspiracy to devise a scheme or artifice to defraud various persons who are alleged to be unknown to the grand jurors; and not one witness was offered during the trial to show that one single person was defrauded, but the prosecution relied upon, and a conviction was

obtained, wholly upon decoy letters prepared and sent by the postoffice inspectors to the defendants, and the defendants' answer given thereto.

It is substantially charged in the indictment, page 6 of the transcript, that the defendants, who were physicians, conceived the idea of defrauding various persons by having persons fill out symptom blanks prepared by the defendants, describing their symptoms, and by representing to the persons so filling out symptom blanks that they could cure certain diseases by diagnosing their cases on the symptom blank.

Briefly stated, the evidence in this case shows that Dr. Charles K. Holsman and another person, who was not on trial, took a lease upon the offices in Los Angeles from which it is alleged, or claimed, the scheme was attempted to be carried out, and Dr. Gideon M. Freeman was in active charge of this office, and that certain decoy letters set out in the transcript were mailed by the postoffice inspectors from a postoffice in Arizona to the defendant Gideon M. Freeman in Los Angeles, making certain inquiries, and in response to these letters the said symptom blanks were sent to the fictitious person, and later on samples of so-called urine was sent from the same address to the defendant Freeman, and a reply purporting to come from his office to the decoy letter sent out through the mails. There was absolutely no evidence to sustain the charge in the indictment except the decoy letters and the replies thereto.

The errors assigned herein relate, generally speaking, first to the overruling of defendants' demurrer to

the indictment and second to the erroneous omission and exclusion of evidence and third to the erroneous instructions of the court and the failure of the court to give certain requested instructions on behalf of the defendants.

However immoral and illegal the acts of the defendants or other persons may have been under the circumstances, and however much prejudice may exist in the public mind against the charge of a professional man under the circumstances, we most respectfully invite very careful consideration to the record in this cause, confidently believing in the first place that fundamental principles of evidence intended for the safeguard of the defendants' rights have been violated; and that the instructions of the court are palpably contradictory and misleading, in one particular, at least; and that the failure to give certain requested instructions, denied to these defendants a fair and impartial trial.

THE ERRORS.

No. 1.

The Court Erred in Overruling Defendants' Demurrer to the Indictment.

The demurrer to the indictment in the case at bar should have been sustained for the principal reason that the indictment fails to allege (except by way of recital) the fraudulent intent of the defendants. The fraudulent intent is an essential element of the offense and it is not expressly alleged. Indeed, assuming all

the allegations of the indictment to be true, there is a possibility that the defendants acted in good faith. The indictment in this case is distinguished from the case of *Van Gesner v. United States*, 153 Fed. 47; *Nickell v. United States*, 161 Fed. 706, and *United States v. Stevens*, 44 Fed. 141, by the language used in the *Gesner* case at page 706, as follows:

“The whole scheme, as alleged, and proved to the satisfaction of the jury, shows beyond question that the false swearing contemplated by the conspiracy could not have been otherwise than wilful on the part of the instigated persons. When the facts alleged *necessarily import such wilfulness*, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law.”

In the case at bar one might infer that the statements of defendants when the symptoms showed health were falsely and fraudulently made with the design to deceive and defraud, but it is by *inference only*, and there is nothing to negative the honest belief of the defendants that notwithstanding such symptoms showed health, the patients needed treatment and encouragement. By an examination of the indictment, pages 6, 7, 8, 9 and 10 of the transcript, it will be seen that there are no positive allegations of the fraudulent intent, and that all the allegations relating thereto are by way of recital. This omission can not be supplied by intendment or implication, and the charge (fraudulent intent) must be made directly, and

not inferentially or by way of *recital*. United States v. Hess, 124 U. S. 485.

It does not matter how fraudulent any act or acts may appear by *implication*, or how repugnant to enlightened intelligence and morality it may appear by the general statement of the case, no person should be put upon trial upon issues not clearly alleged.

United States v. Post, 113 Fed. 853;

United States v. Long, 68 Fed. 348, and

People v. Albow, 35 N. E. Reporter 438.

No. 2.

The Court Erred in the Admission and Rejection of Evidence.

Under this assignment we respectfully call the court's attention to several alleged errors in the admission and rejection of evidence.

(a) On pages 73 and 74 of the Transcript it will be seen that Dr. Frank C. Fuller, a witness for the government, was called by the government and had testified very fully to the fact that he saw the defendant Dr. Holsman, in the summer of 1912, at the office of Dr. Freeman; and that he had charge of the office during Dr. Freeman's absence, and that he, Fuller, was an employee of the office; and on cross-examination it was attempted to be shown by the defendants what the equipment of the office consisted of, particularly as to the drug room and what it contained, and whether or not there was a static machine for the treatment of the diseases alleged to be attempted to be treated by the defendants, and who had

charge of doing the work and receiving and answering the letters, and the court would not permit this examination and denied the defendants the right to cross-examine the government witness, Fuller, upon these points. The witness Fuller was an employee of the defendants. He was, under the evidence, familiar with the office and its contents, also had knowledge of who received and answered the mail, and the essence of the charge being a fraudulent intent upon the part of the defendants to treat persons of diseases without the ability or facilities so to do, it was certainly proper on cross-examination to show by the government's own witness, who was familiar with the defendants' offices, the kind and character of the offices maintained by the defendants. It related to the same subject-matter inquired about by the prosecution, and denied to the defendants the right to cross-examine the government witness upon the matters inquired about in his chief examination. This error is particularly plain as to the defendant Holsman, as it was attempted by this particular witness to show that defendant Holsman was at and worked at the office, and counsel for defendant Holsman was denied the right to inquire of the witness as to who received the mail, etc., that is, as to whether or not the defendant Holsman received it or had anything to do with it, and as to what the very equipment was in the office which it is shown by the witness in his direct examination was used by Dr. Holsman. The evidence is as follows [Tr. pp. 73-4]:

“My name is Frank C. Fuller. I am a physician.

I know Doctors Holsman and Freeman. I first met Dr. Holsman some time in the summer of 1912 at 327½ South Spring street, and first met Dr. Freeman about a year prior to that. In 1912 I was employed at 327½ South Spring street. I think I began there about the third week of May, 1912, and worked until the next May, about the middle of the month. When I first went to work the office was situated at 305½ South Spring street, and shortly after May, 1912, the offices were removed to 327½ South Spring street, and Doctor Freeman was in this same office. Dr. Freeman left the offices at 327½ some time in April, 1913, and I was there about 30 days after he left. I saw Doctor Holsman at 327½ South Spring street for about three weeks, which I think was the latter part of July, 1912. I think he was at this address every day during these three weeks. He had charge of the office during Doctor Freeman's absence. He was not there more than once or twice after that to my knowledge, and this was at the latter part of the year 1912."

"Cross-Examination

of said Frank C. Fuller.

'I was employed at 327½ South Spring street to treat patients under the supervision of Doctor Freeman. I was working on a salary. While I was there Doctor Freeman was in charge of the office and Miss Wilhelm was the stenographer. Mr. Sims (one of the defendants herein) was the man in charge of the drugs and had charge of the moneys. I was in the office at said address for about a year and Doctor

Holsman was only there for about three weeks in the summer of 1912 and for a few days a little later in the year. I think Doctor Holsman did treat patients while he was there.' At this point it was attempted to be shown by the witness what the equipment of the office consisted of, particularly as to the drug room and what it contained, that is, the amount and extent of the drugs and the supply and how it was kept up; and as to whether or not there was a static machine there for the treatment of diseases; and who had charge of and did the work of receiving and answering letters. On objection of counsel for the government that said cross-examination was not competent cross-examination and incompetent, irrelevant and immaterial, the court sustained the objection to this line of cross-examination, to which the defendants and each of them excepted. Whereupon this witness was temporarily excused from the witness stand."

This was too narrow a view of the right of the defendants on the cross-examination.

Diggs v. United States, 220 Fed. R. 545;

Meyer v. United States, 220 Fed. R. 822;

Bassett v. Erickson Construction Co., 213 Fed. R. 810.

(b) It is respectfully submitted that the court seriously erred, as shown on pages 74, 75, 76, 77 and 78 of the Transcript herein, in the admission of government Exhibit No. 1A. The Transcript is as follows:

"By Mr. Moody, assistant U. S. attorney:

'If the court please, I desire to introduce into evi-

dence an affidavit which I hold in my hand, and which counsel has examined.

Mr. Stone: To this we object, and I make the objection on behalf of the defendant Holsman, as hearsay; and we object on behalf of the other defendant as incompetent, irrelevant and immaterial. It has no bearing on the issues whatever.

Mr. Moody: Does the court desire to examine the document and pass on it?

The Court: Well, Mr. Moody, I have an objection here as being incompetent. I don't see how you can introduce it unless you prove it was executed.

Mr. Stone: Your Honor got the objection as to the other defendant, that it was hearsay?

Mr. Moody: I don't think there is any dispute about the execution of it, is there?

Mr. Stone: Well, I don't know.

Mr. Moody: Well, if there is any dispute, I will remove the dispute. I presumed there would not be, in view of the signature that is on there. If there is any dispute I will call a witness to prove its execution.

Mr. Hupp: There is no dispute as to the signature.

The Court: What is that?

Mr. Hupp: There is no dispute as to the signatures.

Mr. Moody: No dispute as to the signatures.

The Court: Let me see it.

(The paper was handed to the court.)

The Court: The objection will be overruled.

Mr. Moody: Mark it as United States Exhibit Number 2. I desire that that be marked United States Exhibit 1-A, in order that the other exhibits may be

kept in the proper order, and save the clerk re-marking the entire number that we expect to be introduced.

Mr. Stone: Let the defendant Holsman have an exception to that ruling as to him, on the ground that it is hearsay as to him.

The Court: Yes, sir.

Mr. Hupp: And exception on the part of the defendant Freeman.

Mr. Moody (reading): "State of California, county of Los Angeles, ss"—

The Court: Just a moment, Mr. Moody.

Mr. Stone: That the record may show, in a conspiracy charge it would not be admissible as a declaration of one of the conspirators at this stage of the trial; and, secondly, it is hearsay pure and simple against the defendant Holsman.

The Court: What is the date of it?

Mr. Moody: September 11, 1911.

The Court: Well, Mr. Moody, it could only go in as a statement or declaration of one of the conspirators, after the formation of the conspiracy, and while it was existing.

Mr. Stone: If there was one.

The Court: And while it was existing. It seems to me like—

Mr. Hupp: You will notice, if the court please, if the court will permit me, on page 1 of the indictment it is alleged that the conspiracy was entered into in the year 1912, whereas this paper that they have offered was a year prior to that time, and therefore would be clearly inadmissible as being outside the issues and before the conspiracy was originated.

Mr. Palmer: Of course, Your Honor, the allegation of a date in an indictment is subject to the proof, and it is not a material allegation, provided that the date is before the time of the returning of the indictment. That is a well acknowledged principle of law. And the fact that this is alleged to have been in 1912, and that this evidence applies to 1911—we have already had a witness on the stand that shows that the very office that is alleged here was moved from the place that is stated in this affidavit, 305½ South Spring street, to the place that is mentioned in the indictment. So that it is connected, and connecting these people together at that time. And the fact that it is alleged the conspiracy was formed in 1912 cannot keep us from showing it, provided we show it was formed at a time before the returning of the indictment, and the overt act—

The Court: I don't think that the dates are very material in this thing, but then your statement here is—

Mr. Stone: If Your Honor will pardon me for making this additional statement, I understand the rule to be in a conspiracy charge that you cannot admit the statements of any one of the alleged conspirators against another alleged conspirator until the government has first proved *prima facie* a conspiracy.

The Court: Yes.

Mr. Stone: There is no doubt about that being the law. Now, my first objection, then, is to the fact that there is no evidence of a conspiracy so far in this trial. In the second place, that any affidavit would

be hearsay as to parties who did not make the affidavit. Now, Your Honor would not for a minute admit testimony if one of the defendants should have stated to somebody that certain people were practicing in an office on a certain date; that would be pure hearsay, whether it is in writing or verbal.

Mr. Palmer: This affidavit is a paper which is required to be made by law, and made by one of these defendants. It is a record of an office required to be made by law, and he has made this, so that it cannot possibly be hearsay so far as that defendant is concerned.

The Court: That is entirely so. There is no doubt about that. But the other defendant has got to be considered. He makes an objection to it.

Mr. Palmer: Now we have connected—

The Court: Now, what proof is here about their office at 305½ South Spring street?

Mr. Palmer: The testimony of Doctor Fuller, just on the stand. He testified that at the time of his employment in May, 1912, that the office was at 305½ South Spring street, and that afterwards, in about June or July of that year, it was removed to 327½.

The Court: All right. I didn't understand those numbers. I will overrule the objection.

Mr. Stone: To which the defendants, and each of them, if Your Honor please, except.

(Thereupon Mr. Moody read to the jury the paper so offered and received in evidence, the same being in the words and figures following, to-wit:)

'PLAINTIFF'S EXHIBIT NO. 1-A.

AFFIDAVIT.

State of California, County of Los Angeles—ss.

G. M. Freeman, being first duly sworn, deposes and says: I am a physician, duly licensed by the state board of medical examiners of the state of California, and am practicing medicine at number 305½ South Spring street, in the city of Los Angeles, county of Los Angeles, state of California, and that the following are the names of each and every person practicing or assisting in the practice of medicine and surgery in my said office, to-wit:

G. M. Freeman, duly licensed by the state board of medical examiners of California;

D. F. Callinan, duly licensed by said board of medical examiners;

H. E. Vreeland, duly licensed by said board of medical examiners;

C. K. Holsman, duly licensed by said board of medical examiners; and affiant further states that

H. W. Baskette, who resides in the city of Chicago, state of Illinois, and who is in the city of Los Angeles temporarily, and who is a duly registered and licensed physician under the laws of the state of Illinois, has upon several occasions been called into consultation.

(Signed) G. M. FREEMAN.

Subscribed and sworn to before me this 8th day of September, 1911.

(Seal)

(Signed) GEO. S. HUPP,

*Notary Public in and for the County of Los Angeles,
State of California.'*

Filed Sept. 11, 1911. Board of Medical Examiners of the state of California. secretary.”

The prosecution offered in evidence this exhibit, more particularly shown on pages 78 and 79 of the Transcript ,and which was an *ex parte* affidavit of the defendant Freeman, sworn to before a notary public on September 8, 1911, and which, among other things, stated that the defendant Holsman was “practicing medicine and surgery” in his, Freeman’s, office at said date. It will be noted that the lease on the premises in the name of defendant Holsman was dated May 22, 1912 [page 72 of the Transcript]. It is therefore respectfully submitted that the admission of this *ex parte* affidavit violated all elementary principles of law. First, it was hearsay as to the defendant Holsman, and second, it was a conclusion of the defendant Freeman, and even if admissible, was a statement of a conclusion, rather than of the facts showing what the defendant Holsman did at the office. Would it not be just as reasonable for some third person to have been placed upon the witness stand by the prosecution, and for the court to have permitted him, over defendant’s objection, to have stated that the defendant Holsman was “practicing or assisting in the practice of medicine and surgery” in the office of the defendant Freeman on September 8, 1911? Was it not absolutely proper and essential that the facts showing just what Holsman did at this office be admitted to the jury, rather than an *ex parte* affidavit which it is not shown ever came to the attention of the defendant Holsman, and which states a conclusion pure and

simple? We respectfully urge this assignment of error for the additional reason that though the grand jurors, under an indictment drawn by the district attorney, charged that the defendants intended to defraud many persons, yet not one single person was ever produced at the trial of this action, as shown by the record, to show that he or she was defrauded. There is absolutely no evidence to sustain the verdict except the decoy letters and the answers thereto. For this reason a plain violation of the elementary rules of evidence by the court should be considered. However, while it may not be necessary, as a matter of law, that any person was actually defrauded, yet why did not the postoffice inspectors, with their usual zeal and diligence, at least discover some person who was defrauded in their long investigation of this case? If it be contended by the prosecution that the admission of this *ex parte* affidavit was a statement of one co-conspirator against another, our reply to that is was only by just such evidence that the defendant Holsman was connected with the case, and the weakness of the case against him was realized in thus attempting to bolster it up by hearsay evidence. But in the next place the fact that the affidavit was a statement of a conclusion and not a statement of facts cannot under any system of reasoning, or on any principle of ordinary simple justice, be held to be competent evidence to go to the jury. We respectfully submit that a citation of authority is unnecessary to sustain the views herein expressed on this assignment.

(c) In the next place it had been stipulated between

the defendants and the prosecution that two editions of the Los Angeles Examiner, containing the advertising of the defendant Freeman, should be admitted in evidence; and when these were offered in evidence under the stipulation [pages 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90 of the Transcript] the assistant United States attorney offered in evidence a bound volume of the copies of the Los Angeles Examiner for the months of July and August, 1912, consisting of the daily paper for those months [pages 80 and 81 of the Transcript]. The Transcript is as follows:

“Now, if the court pleases, I desire to offer in evidence, having been properly identified as having gone through the mails, and being a regular bound volume of the circulated copies of the Examiner for August and July, 1912, these papers, in so far as the same contain advertisements over the signature of Doctor Freeman, similar to the one introduced in evidence.

The Court: Any objection, gentlemen?

Mr. Stone: That is the one covered by the stipulation?

Mr. Moody: No, that is in. I am offering the others now for the months of July and August.

Mr. Stone: They are objected to as no foundation has been laid.

The Court: When you have shown one advertisement, what is the importance of—

Mr. Moody: To show that that was not the only one; that is the idea, if the court please; that these advertisements were a matter of regular course, and there was not but one isolated advertisement placed in.

I have simply taken it during the time alleged in the indictment, the two bound volumes of the Examiner containing similar advertisements.

The Court: The objection will be overruled.

Mr. Stone: Does the record show our objection on the ground no foundation has been laid?

The Court: Well, the objection will be overruled.

Mr. Stone: Exception."

There was absolutely no foundation laid for these papers for July and August, 1912, purporting to contain certain advertisements of the defendant Freeman. There was not one line or word of testimony to the effect that said advertisements were placed in the paper by any of the defendants, or with their knowledge. Whereupon, at this stage of the trial the court, sitting in the cause, asked the assistant United States attorney in substance why was it necessary to show other advertisements when he *had shown* one advertisement, which question in and of itself, stated in the presence of the jury, assumed that one advertisement had been shown, and further assumed that the large bundle of papers for the months of July and August, 1912, also contained the advertisements of the defendant Freeman; in other words, that the advertisements appearing in them were authorized by the defendant Freeman. As shown on pages 80 and 81 of the Transcript, when the objection was made that no foundation was laid for the introduction of this large number of papers, the court overruled defendant's objection to the admission of all these purported advertisements.

It is inconceivable upon what principle of law a

series of advertisements running in a daily paper for a period of about two months might be admitted in evidence against the defendant without some slight foundation showing the authenticity of the advertisements. Was it not just as easy for them to have been identified, and the defendant's connection with them shown, if in truth they were printed under the authority of the defendants, or any of them? Were not the defendants and each of them entitled to the protection of this fundamental rule of evidence?

(d) In the next place, as shown on pages 90 and 91 of the Transcript, the court, over the objection and exception of the defendants, admitted in evidence the decoy letters without showing that they were received at the office of the defendant Freeman; and that certain replies purporting on their face to come from his office was received by the postoffice inspectors who had prepared the decoy letters. The Transcript is as follows:

“Thereupon it was stipulated between counsel for the government and counsel for the defendants that the letters referred to in said stipulation and to be afterwards introduced in evidence as the letters addressed to G. M. Freeman, Los Angeles, California, were each and all of them decoy letters, that is, that none of the letters introduced in evidence on the trial of this cause as having been written to the defendants or either of them were anything more than decoy letters prepared by postoffice inspectors, and that the replies thereto purported to come from the office of the defendant G. M. Freeman, at Los Angeles, and

the defendants objected to the said letters so written by said postoffice inspectors when the same were offered, upon the ground that the same were not competent in that there was no proof that the same were written by Dr. G. M. Freeman or that he authorized the same to be written and that said objections were overruled and that the defendants and each of them excepted."

While it is true, as the court instructed the jury, that it is not necessary to show in a case of this kind that the defendant directly authorized the mailing of a letter, if he put in operation the machinery which causes it to be mailed, yet in the case at bar we contend that the fact that a reply purported to come from the defendants' office is not sufficient evidence that he either directly or indirectly authorized it. This rule ought to be especially enforced in the case at bar, for the reason that, as heretofore sated, there is nothing whatever to sustain the verdict except the decoy letters and the purported replies to the decoy letters; but on the other hand the evidence shows that one Simms, who is also under indictment, must have been the person who mailed, or caused the letters to be mailed.

(e) It is next contended that the court abused its discretion in permitting the witness, Dr. Frank L. Cunningham, to testify as an expert regarding the treatment and diagnosis of gonorrhoea [pages 98 and 99 of the Transcript]. This witness was an osteopathic physician. He was permitted to testify that in his opinion certain diseases could not "be successfully

treated by mail.” This was a general conclusion of the witness, not a statement of facts, when at the same time he was not competent to give testimony as an expert. He states that he was not a medical physician. His whole testimony shows that he was called for the simple purpose of stating to the jury, over defendants’ objection, that in his opinion the diseases spoken of could not be “successfully treated by mail.” The Transcript is as follows:

“My name is Frank L. Cunningham. I am an osteopathic physician. Graduated here in Los Angeles in 1906. I have treated a few cases of gonorrhoea and am fairly familiar with them. I have not treated syphilis.” Thereupon the following proceedings took place while the said witness was on the stand, after objection had theretofore been made to a similar question:

‘Q. By Mr. Palmer: I will ask you, doctor, whether or not in your opinion, a physician can properly and successfully diagnose diseases of men, such as gonorrhoea and spermatorrhoea, by mail, without having seen the patient?

Mr. Stone: The same objection.

Mr. Hupp: To that we object upon the ground that the proper foundation has not been laid, and the witness has not qualified as an expert; that by his own testimony he belongs to a school that is not permitted under the law to administer medicines.

Q. By the Court: You say you have treated gonorrhoea?

A. I have, yes, sir.

Q. Have you treated spermatorrhoea?

A. I never have treated spermatorrhoea.

Q. Have you ever diagnosed such cases?

A. Yes, sir.

Q. You are familiar with the diagnosis of gonorrhoea?

A. Yes, sir.

The Court: I will overrule the objection.

Mr. Stone: Exception. Ex. 5."

It would probably have been as consistent for the prosecution to have called a carpenter, or a civil engineer. Upon matters requiring expert testimony of this serious nature it is respectfully submitted that the expert testimony should be confined to persons engaged in the treatment of such diseases.

(f) Also, as shown on page 101 of the Transcript, the court permitted the prosecution to ask a physician as to whether or not a patient could by an examination of the questions on the question blank alleged to be sent out by the defendant, tell whether or not he had one of these diseases. The Transcript is as follows:

"Thereupon the following proceedings occurred.

Q. Now, will you read the questions there, doctor, and tell the jury whether or not a patient can answer those questions and correctly tell whether or not he had clap or acute gonorrhoea?

Mr. Stone: That is objected to as incompetent, irrelevant and immaterial. It is shown by the doctor's testimony, Your Honor, on direct examination, that some patients could tell and some could not. Now, there is no way to tell, unless he had the patient before him and knew the character of the man.

Mr. Moody: I think Mr. Stone is in error.

The Court: That must depend upon his opinion about it, Mr. Stone. I will overrule your objection.

Mr. Stone: Exception. Ex. 6."

This over the objection of the defendants. The question and answer was certainly incompetent for the reason that it was an opinion of the physician as to the skill, learning, ability and competency of a person, or persons, to answer certain questions and draw certain conclusions therefrom, and which person or persons and their qualifications were wholly unknown to the physician. It was speculation pure and simple. It did not rise to the dignity required by the ordinary rules of evidence. In addition to all this, the question of the prosecution to the witness, Dr. Whitman, as shown on page 102 of the transcript, and a sample of which is as follows:

"Now, doctor, would you say from your experience in doctoring patients that it would be possible to successfully treat patients through the mails upon questions answered by them, without personal contact with the patient in the diseases, the so-called genito-urinary diseases?"

was indefinite and speculative, and therefore incompetent and not within the issues of the indictment. The indictment does not charge that the defendants could not in fact treat patients as claimed in the advertisements; it was no doubt intended to substantially charge in the indictment that the defendants did not in good faith intend to give the treatment which they advertised, and therefore the admission of this kind of

testimony was wholly beside the issues of the case, in addition to the other objectionable features.

(g) It is also contended that the court erred [see page 106 of the Transcript] in refusing the defendants the right to cross-examine postoffice inspector Webster as to the extent of his investigation, and as to whom he had talked to, or written in regard to the treatment received from the office of the defendants. It will be noted that in his direct testimony that he testified to having visited Dr. Freeman at his office, and asked him particularly regarding the signature to the purported answer to the decoy letter; also that Dr. Freeman told him about the nature of the business, and his connection with it, and the use of his name in the business, and the rubber stamp signature appearing on the purported reply to the decoy letter. Further that he received information as to the magnitude or the extent of the business of the defendants. Further that he had seen *bona fide* letters written from the office, and that he had them in his files.

Mr. Webster being an investigator for the prosecution, and having testified to so full an investigation, it was certainly proper for the defendants to be permitted to cross-examine him as to what he found in his investigation generally, whether by talking to people who had transacted business with the defendants, or otherwise, and the court, sustaining the prosecution's objections, stated that he did not think the conduct of the witness was material to the case. A witness's conduct in making an investigation about which he is to testify, is certainly always competent,

and this cross-examination was too narrowly restricted, and should have been received.

(h) Again, on page 109 of the Transcript it will be seen that the prosecution was permitted to ask Dr. Dakin in substance as to whether or not the diseases could or could not be successfully treated through the mails upon questions asked and answered by the patients. The Transcript is as follows:

“Now, basing your answer upon your experience in the treatment of these diseases, syphilis and gonorrhoea, would you say that these diseases could or could not be successfully treated through the mails upon questions asked by yourself and answered by the patients through the mails?”

Mr. Stone: That is objected to as irrelevant, incompetent and immaterial, and not a proper subject of expert testimony.

The Court: The objection will be overruled.

Mr. Stone: Exception. Ex. 9.”

This, we contend, was an improper question, and should not have been permitted, for the reason that it called for the conclusion of the witness as to the ability and understanding of persons whom he had never seen, and particularly a conclusion as to the ability of persons he did not know to answer certain questions; and in the next place, as heretofore urged, the indictment does not charge that the defendants were not able or capable of treating patients by asking and answering questions through the mails, and therefore the questions were without the issues and therefore incompetent for any purpose and highly prejudicial before the jury.

(i) In the next place, as shown on page 111 of the Transcript, it was attempted to be shown by the defendant Freeman while on the witness stand as to how his office was kept and how the equipment compared with other offices for the treatment of such diseases, and this objection was sustained by the court. The Transcript is as follows:

“Q. Compared with the average office, how was that office equipped for the treatment of those diseases?

Mr. Moody: I object to that as incompetent, irrelevant and immaterial and calling for a comparison with other offices.

The Court: Read the question.

(Question read.)

Mr. Moody: He stated what was in there. We object to the comparison.

The Court: Well, objection sustained.”

Mr. Stone: To which the defendants, and each of them, except. Ex. 10.”

It will be noted that the scheme charged was to defraud the people; that they would cure certain diseases in a certain way—then, was not the fact that they were fully equipped in the office for the treatment of such diseases by the use of a static machine and a supply of medicines, etc., competent as bearing on the question of their good faith in being in the business? We think this, on the ordinary principle of reasoning, is sound, and that the court erred in not permitting this examination.

(j) Finally, on the question of admission and rejection of evidence, the most serious error, as we contend, begins on page 113 of the Transcript, as follows (being the evidence of defendant Freeman):

“Q. Did you preserve and have you your correspondence for the year 1913?

A. I have, yes.

Mr. Stone: Do you want to examine this?

Mr. Moody: Is this correspondence of the office at Third and Broadway?

Mr. Stone: Yes.

Mr. Moody: No, I don't want to examine it. It has nothing to do with this case.

Mr. Stone: Q. I show you here, doctor, a number of letters and replies in May, 1913, relating to the business of the office. Will you kindly examine that exhibit for the month of May, 1913, and state whether or not those are the original letters received at the office, and copies of replies given by you in regard to any business of the office or the treatment of any patient?

Mr. Moody: Is this the office at Third and Broadway?

Mr. Stone: That is for the witness to say, where it is. It is immaterial where it was. The conspiracy is alleged to be January 1st, 1912, and from that time on, continuous, Your Honor.

Mr. Moody: During the times mentioned in the indictment.

The Court: Well, this question, Mr. Moody, is

preliminary. Haven't you examined those documents?

A. Yes, sir, *I know them.*

The Court: Well, you can answer the question then.

A. Yes, sir, these are parts of my records.

Q. By Mr. Stone: That is for that month; is that correct?

A. Yes, sir.

Mr. Stone: We offer those in evidence, if Your Honor please.

Mr. Moody: To that we object, on the ground they are incompetent, irrelevant and immaterial. and do not go to prove or disprove any issue in this case, inasmuch as these are from the office of Dr. Freeman, which he has testified he was running alone, separate and apart from the other defendants, separate and apart from the place at which the indictment alleges the conspiracy was formed and carried on, and therefore they are incompetent, irrelevant and immaterial.

Mr. Stone: I want to be heard further on that.

The Court: I will hear from you, Mr. Stone.

Mr. Stone: Now, if Your Honor please, our position is this: That in this case, up to this time, here are men associated in this particular business. They have been charged here with conspiracy, or a scheme or conspiracy to violate a certain provision of the federal code, that is, section 215. That is, a device or scheme to defraud by use of the mails. That has been emphasized by the counsel for the government time and time again,—by the use of the mails. Now, the only thing that appears in evidence up to this time are some decoy letters, that were admittedly false on

their face, admittedly did not state the true facts, that were sent to this office, and to which certain replies had been made. These decoy letters are dated along about September and October, 1912. Now, it is attempted by these decoy letters to show that these men were engaged in a criminal conspiracy in the use of the United States mails. Now, there is no more definite and certain way to tell whether or not a man is engaged in a criminal conspiracy in the use of the mails than by the production of the correspondence which he actually had with his *bona fide* patients or people he was dealing with. In other words, can it be said that the defendants are to be put upon this trial and confronted simply with decoy letters, which are themselves admittedly false, and answers which were sent out under circumstances of this kind, and then they are precluded from showing the entire correspondence over the time, the period in which they say the criminal conspiracy existed. Any business man, in any business in this city, if he was charged with a conspiracy in the use of the mails in his merchandise, or anything else, there is nothing that would show his intention or the conduct of his business more certainly and generally than his actual correspondence with people with whom he was dealing. It is our contention, and I never heard it disputed in this court before, that in a conspiracy charge for the use of the mails, that the letters actually written and sent pertaining to the use of the mails over the times they say the conspiracy existed, should be admitted in evidence. I never have seen the objection made before, and I

have prosecuted numbers of cases in this court, if Your Honor please, and I have never raised the objection, or seen it raised, or heard it questioned that it could not be done, as bearing on the man's intent in the use of the mails.

The Court: Well, Mr. Stone, what difference does it make how many honest letters he wrote, if he wrote one dishonest letter? I don't see how it makes any difference.

Mr. Stone: It makes this difference, if Your Honor please: The inquiry here is whether or not they were engaged in a criminal conspiracy. Can it be stated that they can pick out a few decoy letters that were sent to them, and to which answers have been made, without their knowledge, as the evidence appears here, and then all the letters pertaining to their business, showing they were doing an honest business, can be cut out? That is not the law, Your Honor.

The Court: I don't understand your claim these are the letters of the people alleged in the conspiracy,—the letters of this one witness.

Mr. Stone: No, they have introduced the replies. Now, we offer to show the letters that were actually sent from their office, relating to their business.

The Court: To these particular correspondents?

Mr. Stone: Not to these particular correspondents, Your Honor. It is a very important question in this case, and I will state to Your Honor I am satisfied of my position about it. I may be wrong, but it is either a grave error to refuse the admission of these letters or it is not error at all.

The Court: As I understand you, Mr. Stone, these letters were written by this witness to patients of his?

Mr. Stone: I will correct Your Honor in this, these letters are letters that he received from different people with whom he was dealing, and copies of his replies.

The Court: When he was in the office?

Mr. Stone: Yes, sir.

The Court: Under the employment of Holsman?

Mr. Stone: Well, while he was in the office. His name is signed to them.

The Court: I say, while he was in the employment of Holsman?

Mr. Stone: Yes, sir, while he was in the office, anyway. It does not make any difference whose employment he was in.

The Court: Well, I think it does make a difference in any event.

Mr. Stone: Your Honor, this indictment charges that at the times these letters are dated—we have over 150 letters, which cover the entire correspondence of this office from the time these decoy letters were sent up to the time these postoffice inspectors came to investigate. Now, we are not offering letters after the postoffice inspectors investigated there, because they would say those letters were made for the purpose of avoiding prosecution. But we are offering letters which existed and show the business of the office between the time the decoy letters were sent there and the time they were questioned by government officials, at a time when there was no reason for fabricating matter, but was their correspondence. The indict-

ment charges they conspired to defraud various people by the use of the mails, and we want to show by every man that had correspondence with him that he never intended to defraud him; that the letters we received from those people, and every letter sent to them in every instance stated they must come to the office for examination, in *contravention of the things alleged in the indictment*.

The Court: It seems to me, Mr. Stone, they are self-serving declarations and not admissible.

Mr. Stone: Exception. We want to make the offer for the purpose of the record. Ex. 11.

The Court: Yes, have them marked for identification.

Mr. Stone: Yes. We offer first, if Your Honor please, we might offer them as one exhibit, a series of letters and copies received from patients, people with whom these defendants were dealing in May, 1913, as Defendant's Exhibit No. 1, there being about 30 or 40 letters.

The Court: Are they fastened together?

Mr. Stone: I think so, Your Honor.

The Court: Mark that Exhibit 1.

Mr. Stone: This is No. 1, being the entire correspondence of the office for that month, relating to the treatment of any disease by the use of the mails.

Mr. Moody: While Your Honor has sustained the objection, and while counsel has entered an exception, in order that the records may be clear I will interpose an objection upon another ground, that it is privileged

correspondence, and the privilege is not waived by the addressee or the writer of the letters.

The Court: *That objection is well taken, too, I should think.*

Mr. Stone: I don't think so, under the facts in this case.

The Court: Well, proceed, Mr. Stone.

Mr. Stone: We made no objection to the privilege of the postoffice inspectors."

The defendants identified, by the defendant Freeman, while on the witness stand, their correspondence for several months beginning with May, 1913, the same being office copies of the letters they sent out, and the original replies thereto, for the purpose of showing the nature of the business transacted by the defendants, which was charged to be fraudulent over this period of time. It will be seen that the postoffice inspectors visited the office of the defendants about the first part of the year 1914, and while there inquired of the defendant Freeman about the business; and that the postoffice inspectors testified to these facts on behalf of the prosecution. The correspondence for each month, as above stated, was identified by the defendant Freeman, and offered in evidence, and to each and all of it the court sustained the prosecution's objection. This apparently upon the theory that they would be self-serving declarations. We contend that as to whether or not they were self-serving was a question of fact for the jury, which went to the *weight* of the testimony rather than to its admissibility. The question, therefore, resolves itself into this proposition,

whether or not the defendants, when charged with a scheme to defraud by the use of the mails, and the charge is only supported by certain decoy letters and their purported replies, may not show their real correspondence with people they are actually doing business with by the use of the mails, covering a period of time during which it is charged they were using the mails in a scheme to defraud, and for the purpose of showing their good faith. This correspondence offered in evidence, as identified by the defendant Freeman, was at least *prima facie* what he stated it to be. The replies in many instances bore the official postoffice stamp and date, and showed without doubt that it was *bona fide* correspondence, and there were a large number of letters and replies over the very time that it was charged the defendants were sending out letters to defraud persons, and the same was identified as all the correspondence for these months. It will be noted that the postoffice inspector Webster had obtained certain of the correspondence of the defendants which was *bona fide* between the patients and the defendants, but offered none of it in evidence. It is a case where a conspiracy to defraud by the use of the mails is charged to exist over the very time that the correspondence offered in evidence was had. It is a case where the postoffice inspectors obtained a part of the correspondence of the defendants with their patients and failed to offer any of it in evidence and the defendants thus sought to show their *bona fide* correspondence, and the prosecution objected to the same and relied wholly upon the decoy letters. This was too

narrow a theory upon which to try the case, for what could be more certain evidence of whether or not defendants were attempting to defraud by the use of the mails than the correspondence with their patients. We contend that it was absolutely error to not admit this correspondence in evidence. The cross-examination as to its verity, after its truthfulness was *prima facie* established, would have given the prosecution their full rights in the premises, but because evidence may be weak in its nature, yet if it is relevant to the issue, its weakness is to be distinguished from its admissibility. It should have been admitted on the general principle that where a part of a series of acts in controversy are submitted to the jury, all of the acts relating to the same subject-matter should also go to the jury. This is especially true in a conspiracy charge, for can it be said that the prosecution may (in a conspiracy charge of using the mails to defraud) be permitted to introduce two or three decoy letters relating to defendants' business, and the defense be excluded from showing their *bona fide* correspondence? If any of the correspondence known to the inspectors, other than that offered in evidence by the defendants, tend to show a scheme to defraud, it would have been readily offered in evidence by the government. The principle we are contending for herein is sustained by the case of *Sprinkle v. United States*, 141 Fed. 811. Vol. 3 Wigmore on Evidence, section 2113. Vol. 1, section 103, Wigmore on Evidence. This principle was enacted into the Code of California by section 1854 of the California Code of Civil Procedure, which in substance

provides: when part of an act, etc., or writing is given in evidence by one party, the whole on the same substance may be inquired into by the other, and that when a detached act, etc., is given in evidence, any other act or declaration or writing which is necessary to make it understood may also be given in evidence. A sample of these letters is set out beginning on page 119 of the Transcript. Many others were offered, approximately one hundred, but only a portion were printed to indicate the kind and character of the correspondence.

No. 3.

The Court Erred in Refusing to Give the Instructions Requested by the Defendants.

The defendants requested eleven instructions, as more fully appears on pages 187-194 of the Transcript, as follows:

“Thereupon the government and the defendant rested the case and the defendants requested the court to instruct the jury as follows:

I.

I instruct you in this case that the gist of the allegations against the defendants is a conspiracy and the doing of an act or acts, to-wit, the mailing of letters set out in the indictment, in furtherance of the conspiracy.

You cannot find the defendants or either of them guilty of a conspiracy in the case, even though you believe such has existed as charged in the indictment, unless you further believe from the evidence, beyond

a reasonable doubt, that the defendants or one of them mailed or caused to be mailed the letters, or one of the letters, set out in the indictment, in furtherance of the alleged conspiracy; because a conspiracy under the United States laws is not a crime, though it is an agreement or understanding to do an unlawful act or acts, unless the overt act or one of them alleged in the indictment is actually committed by the defendant or one of the defendants after the conspiracy is formed and in furtherance thereof, and hence, unless you believe from the evidence in this case, beyond all reasonable doubt, that the defendants had entered into a conspiracy, as alleged in the indictment, and further, that the defendants, or one of them, in furtherance of said conspiracy, actually mailed, or actually caused to be mailed, the letters, or one of them, set out in the indictment, then it would be your duty to acquit the defendants.

II.

I instruct you that unless you believe from the evidence, beyond a reasonable doubt, that the defendants conspired together as alleged in the indictment, in devising a scheme to defraud, and knowingly used the mails in furtherance thereof, then no statement or act of either defendant should be considered against any other defendant or defendants in determining whether or not there was a conspiracy as charged in the indictment. That is to say, before the act or acts of any defendant can be used or considered against another defendant or defendants it must first appear

beyond a reasonable doubt that the conspiracy existed as alleged in the indictment.

III.

I instruct you that under the law what is known as decoy evidence, such as the sending of the two letters set out in the indictment, by the postoffice inspector, for the purpose of procuring an answer from the defendants, or one of them, may be used for the purpose of apprehending or ascertaining whether a person is engaged in the commission of a criminal offense against the laws of the United States. But in this charge of conspiracy, unless you believe from the evidence, beyond a reasonable doubt, that at the time the said decoy letters or letter was mailed to the defendants or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment; or unless the defendants had conspired together, as alleged in the indictment at the time of or before the sending said letter or letters by the postoffice inspector, then the evidence of said decoy letters is not alone sufficient upon which to base the verdict of guilty, because a government official cannot conspire with another person to violate the laws of the United States, and it is against public policy for a government official to suggest or originate a conspiracy or any other crime, and hence, if you believe from the evidence in this case that a conspiracy, as alleged, was suggested and planned by the postoffice inspector, or inspectors, and the defendants were not actually in said conspiracy as alleged, except as shown by a re-

sponse to the letters of said postoffice inspector, then it will be your duty to acquit the defendants.

IV.

I instruct you that it is against the policy of the laws of the United States to sustain a prosecution or conviction upon an indictment charging a conspiracy against the laws of the United States if the conspiracy or plan originated solely in the mind or minds of the government officials, and hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendants at the time alleged in the indictment had formed a conspiracy as therein alleged, without the suggestion and origination of the same by the postoffice inspector, or inspectors, and independent thereof, then it will be your duty to acquit the defendants.

V.

I instruct you that while it may be proper under the laws of the United States for a government officer to use decoy methods in apprehending crime, that is, to ascertain whether or not a person or persons are actually engaged in an offense against the laws of the United States, nevertheless, the evidence, if any, or the facts or circumstances, if any, procured by said decoy method, can only be considered by you in determining the question as to whether or not the defendants had actually entered into the conspiracy as charged in the indictment, and any fact, or facts, or circumstances acquired by said decoy letters are not of themselves sufficient to sustain a verdict of guilty unless you believe from the evidence beyond a reason-

able doubt that the defendants had, independent of said decoy letters, entered into the conspiracy at the time and place as alleged in the indictment.

VI.

I instruct you that unless you believe from the evidence beyond a reasonable doubt in this case, that the defendants or one of them actually mailed or actually caused to be mailed the letters, or one of them, set out in the indictment, then it will be your duty to acquit the defendants, because unless the defendants, or one of them, knew of, or in some way authorized the mailing of the letter, or letters, set out in the indictment, then the defendants would not be guilty, regardless of whether or not you may believe there was, or was not, a conspiracy between them.

VII.

I instruct you that a person cannot, as the agent or employee of another in any business, bind his employer in a criminal proceeding or charge, and his employer is not responsible for the acts of the employee in committing a criminal offense, unless you believe from the evidence, beyond a reasonable doubt, that the employer in some way knew of the act or acts of the employee, alleged to be criminal, or in some way authorized the acts of the employee; and hence, unless you believe from the evidence, beyond a reasonable doubt, that the defendants in some way knew of, or intentionally authorized the mailing of the letter or letters set out in the indictment, then it will be your duty to acquit the defendants.

VIII.

I instruct you that before you can find a verdict of guilty against the defendants in this case that you must find that all of the following conditions exist:

(a) That there was a conspiracy between them, as alleged in the indictment.

(b) That the object of that conspiracy was that the said defendants should devise a scheme or plan to defraud the persons, as alleged in the indictment, and

(c) That said defendants intended the use of the United States mails in carrying out or in the furthering of the object of such conspiracy.

And it is necessary, before you are authorized to find a verdict of guilty in this case, that you believe all of the above elements to exist in this case. It is not sufficient that one of them exist, but they all must have existed, as alleged in the indictment, and to your satisfaction, beyond a reasonable doubt, before you are authorized to convict the defendants.

IX.

I instruct you that the principal or master is not criminally liable for the acts of his agent or servant even though done in the general course of his employment, unless such acts of the agent or servant are authorized or consented to by the principal or master, and that no authority to do a criminal act will be presumed. Hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Holsman, actually mailed the letter or letters set out in the indictment, or caused the same to be mailed, or in some way knowingly authorized or acquiesced

in the mailing thereof in furtherance of the scheme as charged in the indictment, then it will be your duty to acquit him, even though you may believe from the evidence that the defendant Sims was employed by the defendants to care for the correspondence and answering letters, even though you believe that the answering of letters by the defendant Sims was in the course of his employment.

X.

I instruct you that under this charge of conspiracy, before you are authorized to convict the defendants, or either of them, you must believe beyond a reasonable doubt that they had an understanding or agreement between or among themselves to defraud any and all persons who could be induced to write to them as charged in the indictment. And further, as a part of said conspiracy, they intended the use of the mails in furtherance of said conspiracy.

The first question for you to consider is, was there a conspiracy? That is to say, did the defendants conspire or agree together and between or among themselves to commit the offense against the United States, as charged in the indictment? And, in the next place, did they enter into an agreement or plan by which it was agreed or understood between or among themselves that they would defraud any and all persons, as charged in the indictment? And, in the next place, did they knowingly or intentionally mail, or cause to be mailed, either of the letters charged in the indictment?

Before you are authorized to convict the defendants, or either of them, you must believe beyond a reasonable doubt that they intended to defraud in the manner and by the use of the means set out in the indictment.

If the defendants, acting as specialists in the treatment of diseases, acted in good faith and honestly believed in the representations which they made, if any, and did not by any of their said acts, as charged in the indictment, intend to defraud any person or persons, then it is your duty to acquit the defendants.

XI.

I instruct you that though you may believe from the evidence that the defendant Holsman was financially interested in the office conducted at Los Angeles at the time alleged in the indictment, yet unless you believe from the evidence, beyond a reasonable doubt, that he knew of or consented to or in some way authorized the mailing of the letters, or one of them, set out in the indictment, then you cannot convict him, and it will be your duty to find a verdict of not guilty as to him.

To the refusal to give the foregoing instructions and each of them the defendants and each of them duly excepted. Ex. 20-30, inclusive."

Under this assignment we call attention to the refusal of the court to give the eleven requested instructions.

It will be noticed that the first requested instruction was to the effect that the defendant should be acquitted unless the jury believed beyond a reasonable

doubt that they or one of them mailed, or caused to be mailed, the letters, or one of the letters, set out in the indictment. There was absolutely no proof that the defendant Holsman ever knew anything about the mailing of the letters. He was not in the office at any time any of the decoy letters were mailed, and the defendant Freeman positively testified that he did not mail, or cause to be mailed, or know anything about the mailing of the replies to the decoy letters. We for this reason respectfully submit that defendants' requested instruction No. 1 on this point should have been given.

In the next place requested instruction No. 2 was to the effect that before the act, or acts, of any of the defendants could be considered or used against another defendant, or defendants, it must first appear beyond a reasonable doubt the conspiracy existed as alleged in the indictment. It was, therefore, certainly a very serious error not to give this instruction in view of government's Exhibit A-1 admitted in evidence over defendants' objection, and which we have discussed under subdivision (b) of No. 2, *supra*.

In the next place defendants' requested instructions Nos. 3, 4 and 5, pages 189-191 of the Transcript, are squarely the law within the meaning of the following cases:

Woo Wai v. United States, 223 Fed. 412;

Sam Yick *et al.* v. United States, 240 Fed. 60.

These instructions should have been given because all the evidence submitted to the jury as tending to prove the fraud on the part of the defendants shows

that the postoffice inspectors suggested the writing of the replies to the decoy letters, and wholly brought about the replies upon which the prosecution alone rested to sustain its conviction. It will be noted later that when the court on its own motion instructed the jury, that he gave a part of requested instructions Nos. 3, 4 and 5, and in the same instruction, given of his own motion, gave another that contradicted the one given. Refusal to give requested instructions Nos. 3, 4 and 5 under the evidence was clearly error under the two cases above cited.

In the next place defendants' requested instruction No. 5, on page 190 of the Transcript, to the effect that the decoy evidence could only be considered by the jury to determine whether or not the defendants had actually entered into the conspiracy, and were not of themselves sufficient to sustain a verdict of guilty unless the jury believed, independent of said decoy letters, that they had entered into the conspiracy, should have been given under the authority of the two cases cited above, which clearly hold that the evidence of the instigators of the crime is not sufficient. In the case at bar, of course, it will not be contended, and cannot be contended, that there was any evidence against the defendants to support the charge, except the decoy letters.

In the next place defendants' instruction No. 7 should have been given on behalf of the defendant Holsman for the reason that all the evidence in the case shows that while Holsman owned the office, or was an owner with other persons, the defendant Free-

man was working on a salary and commission, in charge of the office, and that Holsman had given express instructions not to send out such literature as is charged in the indictment, and was not in the office at the time the answers to the decoy letters were sent out, and therefore he was in the identical position of an employer, and if the replies were made by the defendant Simms, and against the instructions of the defendant Holsman, the instructions should have been given, for it is elementary law that the agent or an employee of a person in business cannot bind his employer in a criminal proceeding, and his employer is not responsible for his acts in committing a criminal offense unless the employer in some way knew of the act or acts of the employee, or in some way authorized the act. The evidence clearly shows the facts above stated. Then, why was it not just and fair that the instruction be given on behalf of the defendant Holsman? It let the case go to the jury in such a way that they must of necessity infer, because defendant Holsman was the owner of the business, that he was criminally responsible for an act committed in his absence, and which he did not authorize. Also the same theory was embodied in defendants' requested instruction 9, on page 192 of the Transcript, in different language, but this was refused by the court. Defendants' requested instructions No. 7 and 9 were especially applicable to the evidence in the case, and in no part of the court's instructions was the principle embodied as contended for in these instructions.

Again, defendants' requested instruction No. 11,

page 194 of the Transcript, to the effect that unless the jury believed that the defendant Holsman knew about, or consented to, or in some way authorized the mailing of the letters, or one of them, set out in the indictment, then he could not be convicted, should have been given for the reason that the uncontradicted evidence shows that he was not only absent from the office at the time the decoy replies were mailed, but had theretofore given express instructions not to send out such letters through the mail.

No. 4.

The Court Erred in Instructing the Jury.

The court erred in instructing the jury of its own motion as shown on pages 200, 201 and 202, the same being the court's instruction of his own motion numbered 12 and 13, for the following reasons:

First, the instructions are inconsistent, contradictory and misleading

Second, there were upon the weight of the evidence and which instructions are as follows:

"XII.

"It is lawful that what is known as decoy letters, such as the letters sent by the postoffice inspector in this case for the purpose of procuring an answer from the defendants, or one of them, may be used for the purpose of ascertaining whether the person addressed is engaged in the commission of a criminal offense against the laws of the United States. If at the time the said decoy letter or letters were mailed to the defendants, the said defendants were engaged in the

criminal practice charged in the indictment, and the said defendants in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy.

A government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime. The conspiracy with which the defendants are charged must be proven to exist *independently* of any inducement to enter therein by any government official. In other words, if the conspiracy existed, *it does not matter what the government officers did in order to procure evidence to prove it.*"

"XIII.

"It is admitted by the government in this case that each of the letters set out in the indictment and alleged therein to be the overt acts pursuant to the accomplishment of the purpose of the conspiracy alleged in the indictment, were received by the addresses therein respectively in reply to letters respectively addressed to the defendant G. M. Freeman, M. D., either by a United States postal inspector or by another procured by the inspector so to do, and that the letters addressed to said defendant were addressed to him for the purpose of giving to the government information as to whether or not the defendants charged in the indictment were engaged in an unlawful use of the

mails. These letters so addressed to said defendants may be properly designated as decoy letters. You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is *no defense* in this action. You are further instructed that a government officer suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has a right to seek information under an assumed name, directly from such person or persons so suspected. That if such suspected person or persons respond to such inquiry for such information, and by so responding violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official."

It will be noted that the court in the last part of instruction 12 instructed the jury that the "conspiracy with which the defendants are charged must be proven to exist *independently* of any inducement to enter therein by any government official." Also in the same instruction that "In other words, if the conspiracy existed, it *does not matter what the government officers did* in order to procure evidence to prove it." Again, in instruction 13 the court instructed the jury as follows: "You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is *no defense* in this action." Now

let us analyze these statements taken together. The analysis amounts to this: First, that the jury are told that the conspiracy must be proven *independently* of any inducement to enter into it by the government official, and in the next place that the fact that the letters were decoy letters is *no defense* in this case, when as a matter of fact they *may* or *may not* have been a defense, depending upon whether or not the jury believed the conspiracy existed independently of the letters, and for this reason, also, the charge was upon the weight of the evidence. In other words, the court had plainly told the jury that the conspiracy must be proven *independently* of any inducement to enter therein by the government officials, and then with full knowledge that the decoy letters were the only evidence in the case relied on by the government, the court instructed the jury that the fact that they were decoy letters was *no defense*, thereby making the instruction misleading, contradictory and confusing.

In the next place the latter part of instruction No. 13 is not only confusing, misleading and contradictory of the other portions of instructions 12 and 13, but is squarely not the law within the meaning of the decisions in the case of *United States v. Woo Wai* and *United States v. Sam Yick et al.*, *supra*. It will be noted that that part of the instruction reads as follows:

“You are further instructed that a government officer suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has a right to seek information under

an assumed name, directly from such person or persons so suspected. That if such suspected person or persons respond to such inquiry for such information, and by *so responding* violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official."

The fault of this portion of the instruction particularly is that it first tells the jury that the government official may use the decoy letter for the purpose of finding out whether a person is engaged in a conspiracy when the jury had already been instructed that the decoy letters of themselves were not sufficient to convict, and then this latter part of instruction No. 13 tells the jury that if by *so responding* violates a law of the United States, etc., when indicted for that offense he cannot set up that he would not have committed the offense if the government official had not induced him to do so.

What was no doubt intended was to instruct the jury that while the decoy letters and answers, if wholly induced by the government officials, was not sufficient to sustain the conviction, yet it was legitimate to use them to find out whether or not defendants were engaged in a criminal conspiracy, but the instruction reads that "if the person by *so responding* violates the law." It is not a question of whether or not the *re-*

sponse to the decoy letter violates the law, but whether or not there *is a criminal conspiracy*.

So it will be seen by casual examination of instructions 12 and 13, given by the court of his own motion, that it is impossible to reconcile the plain inconsistent, contradictory statements in regard to the law of decoy letters. It is very plain, and too plain to admit of doubt, that the court instructed the jury in the first place that the decoy letters were not sufficient to convict, that there *must be independent evidence* of the criminal conspiracy, and immediately following this instructed the jury that the fact that the letters were *decoy letters was no defense*, so that the decoy letters being all the evidence in the case relied upon by the government, it is impossible to tell whether the jury believed that the evidence adduced by the decoy letters showed a criminal conspiracy, or whether or not they followed the court's instruction to the effect that the fact that the letters were decoy was *no defense*. In other words it seems very evident that the court, in view of the decisions of the Supreme Court of the United States holding that decoy evidence was sufficient to sustain a conviction against a mail carrier for opening mail, and in view of the two recent decisions of this Honorable Court hereinbefore quoted, attempted to extract from these various decisions, which are not at all inconsistent, but are entirely harmonious, a new statement of the law which is not only in violation of the decisions of the Supreme Court of the United States in the decoy letter cases, but is not supported by the decisions of this Honorable Court,

and which two instructions when carefully read, and again carefully read, lead the more to bewilderment and uncertainty as to just what was meant by the court. It is not a clear, concise statement of the law, and lacks in every element of certainty and consistency.

These defendants were entitled to a clear statement of the law to the jury. It is therefore most respectfully submitted that the Honorable District Judge who tried this case erred in the submission and rejection of evidence and in refusing the defendants' requested instructions, and in the giving of instructions 12 and 13 of his own motion, and that this cause should be reversed and remanded, and a new trial ordered in favor of these defendants.

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United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,
Appellee,

vs.

Charles K. Holsman, et al.,
Appellants.

BRIEF OF APPELLEE.

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SEP 2 1917

Filed



No. 3015.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,	}
<i>Appellee,</i>	
<i>vs.</i>	
Charles K. Holsman, et al.,	
<i>Appellants.</i>	

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appellants in this case, through their counsel, have made a purported statement of the case at the beginning of their brief, but the statement is so short that we do not believe it gives this court a fair idea of the scope of the evidence produced before the court below.

These appellants, Charles K. Holsman and Gideon M. Freeman, were indicted, together with Henry L. Giles, Ambrose C. Sims and Otto C. Joslin, the charge

in the said indictment being that the said defendants conspired to commit an offense against the United States, to-wit: the offense of conspiring to devise a scheme and artifice to defraud and to use the United States mails in carrying out said scheme. The indictment, set out on pages 6 to 14, inclusive, of the transcript, gives the scheme and artifice in detail and sets out the overt acts alleged to have been committed in furtherance thereof. In support of the allegations in the indictment the government produced eight witnesses, a very brief resume' of whose testimony is set out in the transcript, and the government introduced in evidence, as will appear from the minutes of the court set out in the transcript, thirty-six exhibits, of which only six are set out in the transcript. The testimony of the government's witnesses and the exhibits introduced on behalf of the government showed that these appellants, during the time alleged in the indictment, were doing business as physicians in the city of Los Angeles, first at 305½ South Spring street, and later at 327½ South Spring street. It was shown that the defendant Holsman and the defendant named H. L. Giles, who was not on trial, leased the premises at 327½ South Spring street for the purpose of carrying on the business of physicians and surgeons on May 22, 1912, the lease being for a period of five years; that the business was conducted in the name of Dr. G. M. Freeman, and that Dr. Freeman was merely an employee and had no interest in the business; that Dr. Holsman visited the premises at different times and took a more or less active part in the business on these

visits; that the business was largely advertised through the newspapers, a sample of the advertising being set out on pages 81 *et seq.* of the transcript and marked Plaintiff's Exhibit No. 2. On pages 87 to 90 of the transcript is set out a stipulation relative to all of the correspondence introduced in evidence as United States exhibits, and from which it appears that the letters addressed to Dr. G. M. Freeman and introduced in evidence were actually received at this office and the answers thereto, purporting to come from said G. M. Freeman in response to said letters, were actually sent out from the office of said G. M. Freeman at 327½ South Spring street. The stipulation further admits that the preparations sent through the mails as urine and consisting of cold tea, ammonia, salt and paste, were actually received in the office of said G. M. Freeman.

The letter set up in the indictment [Transcript, page 13], and which was introduced in evidence under this stipulation, represents that Dr. Freeman subjected this supposed urine to a "careful analytical test," from which he arrived at the conclusion that the patient was suffering from a disease which he, Dr. Freeman, promised to cure upon receipt of certain stipulated amounts of money.

It was further stipulated between the parties that the symptom blank set out on pages 92 *et seq.* of the transcript (which was in all material respects similar to the ones mentioned in the said stipulation as having come from Geo. Mertens, Hamil Hall and Robert E. Judson) indicated health. The correspondence set out

in the indictment was introduced in evidence under the said stipulation, as will appear from the minutes of the court set out in the transcript and from the stipulation and from the reading of the transcript on page 98.

The indictment letter also represents that the symptom blank has been examined and that the doctor knows all about the patient's trouble and can cure it, whereas it was stipulated [Transcript page 98] that the symptom blank referred to showed the condition of a normal man.

We realize that the paucity of the transcript and the absence of the majority of the government's exhibits may somewhat prevent the court from obtaining a fair and concise view of the case from the point of view of the government, but the appellants have assigned no error upon the insufficiency of the evidence other than assignment of error No. 8 set out on page 223 of the transcript, which complains only that the evidence of the government was based upon decoy letters and therefore insufficient. Counsel in their brief make no argument at all upon the insufficiency of the evidence nor even upon the 8th assignment of error, other than that set out on pages 20 and 21 of their brief. Therefore for all the purposes of the appeal now before this court, the transcript is ample as all the assignments of error have to do with the admission of evidence and the instructions of the court.

In their brief counsel argue a number of points which are not assigned as error in their assignment of

errors. These points are designated in their brief, under No. 2, subdivisions "e," "f," "g," "h," and "i," and while we are aware that under rule 11 of the rules of this court this court will notice a plain error not assigned, still we would respectfully suggest to the court that there is no plain error in these points argued by counsel, and that there is much vice attendant upon the practice of attorneys basing a large, if not a major portion of their brief upon points not assigned as error in the assignment of errors, for the reason that if the alleged errors had been assigned in the assignment of errors the appellee in this case, or in any case, would undoubtedly see fit to include in the transcript much that would be irrelevant for the consideration of the case upon the alleged errors only included in the assignment filed.

ARGUMENT.

No. 1.

Upon the point that the court below erred in overruling defendants' demurrer to the indictment (brief of appellants, pages 5, 6 and 7) we would state that a careful reading of the indictment will show that the argument of counsel is wholly erroneous and based upon an incomplete and incomprehensive reading of the indictment. Counsel for appellants state that the indictment fails to allege, except by way of recital, the fraudulent intent of the defendants. The indictment [pages 6 to 14 of transcript] alleges that the defendants "did unlawfully, wilfully and feloniously

conspire, combine, confederate and agree together to commit an offense against the United States, that is to say, the said defendants did then and there *knowingly* (italics ours) and unlawfully conspire, combine, confederate and agree together in devising and intending to devise a scheme to defraud certain persons.” So much for the charging part of the indictment. In the delineation of the scheme, among other things, it is said: “that by means of said advertisements said defendants intended to cause and induce divers persons to communicate and open correspondence with them in the name of said defendant Gideon M. Freeman, by means of the postoffice establishment of the United States, relative to their real or supposed symptoms or ailments; that when said persons so intended to be defrauded communicated with said defendants by the means aforesaid, said defendants intended to write and communicate with said persons by means of letters to be sent through said postoffice establishment enclosing a symptom blank in each of said letters, and advising each of said persons to answer carefully all questions contained in said blank, relative to his real or supposed ailments, and to send the same and a sample of such person’s urine to said Freeman, who would make a thorough study and analysis of same and then would be able to treat such person as well as if he were in said Freeman’s office; and that nothing would be left undone by said Freeman to restore said persons to full vigor and health, and, irrespective of any symptoms that might be disclosed to defendants by said blanks and samples of urine, and even where

said blanks and urine disclosed a normal physical and mental condition, and without any attempt by analysis of said urine or by careful examination of said symptom blank, or otherwise, to ascertain whether or not such persons were actually suffering from such a disease or any disease whatever, or believed themselves to be suffering therefrom, defendants intended, in letters to be sent to said persons through the postoffice establishment of the United States, to state to such persons, and induce them to believe, that their condition was thoroughly understood by defendants and that such persons were right in attending to their trouble at once, as such trouble, if neglected, would steadily become worse and gradually undermine the general health, wreck the nervous system, and result in the total loss of manhood of such persons, and defendants intended to state to and advise such persons in such letters to commence treatment at once, and that if such persons wished to avail themselves of said Freeman's treatment and advice, to forward to the secretary of said Freeman money to pay for a month's treatment, or if the entire three months' course of treatment was desired to send the entire amount therefor, which amount defendants intended to place at considerably less than three times the amount to be fixed for one month's treatment, which latter amount defendants intended to fix at different amounts to the different individuals; the basis upon which said amounts would be fixed and the different amounts defendants intended to so fix being to the grand jurors unknown. Said statements, representations and advice so intended to

be so made and given to said persons so to be defrauded as aforesaid, *were not intended by said defendants to be made in good faith for the purpose of ascertaining the physical and mental condition of said persons, so that defendants could in good faith furnish treatment to cure and alleviate such condition; but were intended to be made by defendants for the purpose of inducing said persons to believe they were seriously afflicted with a disease of the urogenital organs, regardless of whether said persons were so afflicted or not, and to induce said persons to send and pay money to said defendants in cases where no treatment at all, physical or mental, was needed, and to induce others of such persons to pay for more treatment than the actual physical and mental condition of said other persons so to be defrauded required.*" (Italics ours.) [Transcript, pages 7 to 10.]

A fair reading of the part of the indictment above set out will convince any one that the fraudulent designs and purposes of the defendants are thoroughly described and set out in the indictment and are not to be deduced *by inference only*. Indeed, the quotation from the case of Van Gesner v. The United States, 153 Federal 53 (erroneously cited on page 6 of appellants' brief as page 706), is entirely an argument in favor of the overruling of the demurrer in this case, rather than the sustaining of the same.

We have carefully examined the cases cited by counsel in support of their argument on the demurrer, and while in some of the cases cited demurrers have been sustained, nevertheless, in no case cited has a demurrer

been sustained to an indictment which charged with the particularity with which this indictment charges the fraudulent intent of the defendants. The case of *Hughes v. United States*, 231 Federal 50, is a case of the identical kind now before this court. In that case the demurrer was overruled, and the court said, in part:

“The demurrer criticizes the indictment upon the general ground that it does not set out an offense against the laws of the United States. The indictment contains four counts. The first charges a conspiracy against all the defendants to violate section 215 of the Penal Code. The remaining three all charge the same defendants with the violation of that section. It is contended by the demurring defendants that the counts fail to show the devising of a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent representations or promises, in that it is not charged that the defendants were not qualified to administer the treatment they promised to administer, nor that they did not, in fact, intend to administer such treatment, when paid therefor. It is true that the indictment does not aver that the defendants were not so qualified, nor that they promised with the then intention of not furnishing any treatment, though paid for so doing. The scheme relied upon by the government is a different one. The fraud is alleged to have consisted in soliciting and receiving money from patients, intending to furnish medicine or treatment therefor, without regard to the needs of the patient for that or any treatment, without making any

diagnosis such as would inform them as to the need of the patient for any or for what treatment, and with the intent to receive the money, though they knew that the patient paying it had no need of any treatment, or of the treatment to be furnished in consideration of it, or had purposely refrained from informing themselves of his needs in those respects. In other words, the indictment charges the defendants with having devised a scheme to solicit money from patients for promised treatment, not intending to furnish treatment in good faith, but only as a pretext for securing the patient's money. Whether the treatment or medicine furnished was of little or much value intrinsically, in this view of the scheme, was of no consequence. We think the scheme alleged to have been devised by the defendants was one included within and prohibited by section 215 of the Code."

Therefore we would respectfully submit that the lower court was correct in its ruling upon the demurrer.

We will not take up in the order argued in the brief of appellants the alleged errors upon the admission and rejection of testimony and evidence.

No. 2.

(a) This alleged error is included in the assignment of errors and is set out on page 224 of the transcript as assignment No. 11. Counsel in their brief on pages 9 and 10 set out the testimony of Dr. Fuller. Counsel complains that they were restricted in their cross-examination of Dr. Fuller to a degree that constitutes error.

But careful reading of Dr. Fuller's testimony as set out in the transcript and brief of appellants discloses that upon direct examination he in no manner touched upon the matters concerning which counsel desired to cross-examine him. The scope of cross-examination is largely a matter for the exercise of discretion by the lower court, but one of the cardinal principles of cross-examination is that it must be confined to those matters touched upon in direct examination. In this instance Dr. Fuller was an employee of the office at 327½ South Spring street during the time the conspiracy was in progress, and it was to be presumed that he would be an unfavorable witness to the government. It was the privilege of the prosecution, and exercised as such in this case, to limit the direct examination to certain matters only so that counsel for the defendants would be unable to substantially make Dr. Fuller their witness by their cross-examination of him. It was upon this theory that the court sustained the objection to the cross-examination on the ground that it was not proper cross-examination. The objection was also sustained on the ground that it was incompetent, irrelevant and immaterial as to how the offices were equipped as no allegation in the indictment charges that there was any lack of equipment or that there was to be any personal contact with the persons to be defrauded named in the indictment. The defendants might well have been able to treat persons in their office and yet have been guilty of the scheme and artifice to defraud as laid in the indictment.

In any event, if the counsel for defendants had de-

sired to ascertain the equipment of the said office, Dr. Fuller was available to them and they could have made him their own witness. They did not pursue this course and therefore they are not in any position to complain now of the action of the court below in exercising his discretion in limiting the cross-examination of this witness.

As to the three cases cited on page 10 of appellants' brief, counsel do not in any manner suggest just how these cases support the contention set up in their brief nor what parts of the opinions in these cases are relevant. We have been unable to discover wherein these cases support the view taken by counsel of the action of the lower court in this matter.

(b) The argument of counsel for appellants under this letter has to do with the admission of a certain affidavit set out on pages 78 and 79 of the transcript. The execution of this affidavit is admitted, and being executed by the defendant G. M. Freeman, was certainly competent as to him. This is an affidavit required by the laws of the state of California and bears the file marks of having been filed before the State Board of Medical Examiners of the state of California on September 11, 1911. The government had established the association of Drs. Freeman and Holsman in 1912 by the witness Fuller. It is always permissible for the lower court to admit evidence in a conspiracy case of association of the conspirators and if such evidence is not connected with the conspiracy it may be stricken from the record upon a proper motion. At the close of the government's case no motion was made

on behalf of the defendant Holsman to strike this affidavit from the record upon the ground that it had not been properly connected with him. The undisputed law of conspiracy is that the statement of any conspirator is binding upon all other conspirators after the establishment of the conspiracy is proved. Counsel for defendants not having made a motion to strike this affidavit from the record, the court, upon its own volition, in charging the jury, said:

“The court further instructs you that, while the acts or declaratioins of a co-conspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during the existence and in furtherance of the unlawful combination when proven, is not only evidence against him, but is evidence against the other conspirator, who, if the combination be proved, is as much responsible for such act or declaration as if done or made by himself.

“You must not, however, permit yourselves to use against either defendant, anything said or done outside the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt, that at the time the things were said or done a conspiracy existed between the party saying or doing the things and the defendant to be effected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy.”
[Transcript, pages 199 and 200. Instruction X.]

We would therefore suggest that there was no error in the admission of the affidavit and that if there were

any irregularity in its admission it was cured by the said instruction.

(c) This alleged error has to do with the introduction into the evidence of two bound volumes of the Los Angeles Examiner, being for the months of July and August, 1912. The stipulation set out on page 87, *et seq.*, of the transcript states in part:

"It is further stipulated that the person writing said letters was guided by the language contained in an advertisement circulated in the Los Angeles Examiner July 14, 1912, over the name of Dr. G. M. Freeman and other advertisements appearing in newspapers published and circulated in said city of Los Angeles." [Transcript, page 88.]

The advertisement appearing in the issue of July 14, 1912, is set out in the transcript as Plaintiff's Exhibit No. 2 of page 81, *et seq.*, of the transcript, and was introduced in evidence by stipulation. The issues of the Examiner complained of were introduced in evidence only so far as they contained advertisements of a similar nature to that introduced in evidence as Plaintiff's Exhibit No. 2. Therefore, it having been proved that Exhibit No. 2 was authorized by defendant Freeman, that was a sufficient foundation to admit similar advertisements which had occurred through a number of other editions of the same paper. The defendant Freeman, when placed on the witness stand in his own behalf, did not deny putting these advertisements in the paper, but, on the other hand, admitted that he did the advertising. [Transcript, page 184—cross-examination.]

The case of Diggs v. United States, 220 Federal 541, paragraph one of the syllabus holds that where a fact in the knowledge of a defendant is not denied when the defendant takes the stand in his own behalf, it shall be considered most strongly against him. Applying this principle to the situation complained of, it, in effect, amounts to an admission by the defendant Freeman that he was the author of all the advertisements introduced into evidence and this, together with his own testimony on page 184 of the transcript, would preclude any possibility of error in the admission of this evidence.

(d) The argument under this letter is apparently based upon assignment of error No. 8, page 233 of the transcript. The objection of counsel, as set out in their brief, page 20 and 21, is that these letters were not competent in that there was no proof that the same were written by Dr. G. M. Freeman, or that he authorized the same to be written. The stipulation set out on pages 87, *et seq.*, of the transcript, admits the receiving in the office of Dr. Freeman of all of the letters introduced in evidence by the United States purporting to be sent to said Dr. G. M. Freeman, and that the answers to said letters introduced in evidence on behalf of the United States purporting to be from Dr. G. M. Freeman were actually sent out from the office of Dr. Freeman at 327½ South Spring street. The stipulation waives every objection except that of incompetency. Some of the letters were those set out in the indictment and others were of like character as is stated in the stipulation.

Therefore they were absolutely competent and material in the case, and it was left to the jury to decide from the circumstances surrounding the receiving and answering of these letters whether or not the same was done with the knowledge of these appellants. Any fact may be proven by circumstances as well as by direct evidence, and the circumstances in this case were so strong that the letters were written with the knowledge of these appellants that the jury found them guilty.

Now, as to the point that these were decoy letters, we would state that the letters written to the office of Dr. Freeman, as stipulated in the transcript, were letters which were mailed at the instance of postoffice inspectors in an endeavor to discover whether or not the postal laws were being violated. It will be remembered that Dr. Freeman was doing extensive advertising and that the advertisement set out on pages 81, *et seq.*, of the transcript, repeatedly urged correspondence and stated in part:

“Write me a full description of your symptoms and trouble if unable to call. All dealings are confidential. Call or write today for free consultation.”

Undoubtedly these letters so caused to be mailed by the postoffice inspectors were decoy letters, but the answers to them emanating from the office of Dr. Freeman were in no sense decoy letters, and, inasmuch as none of the defendants in the case were aware of the character of the letters sent to the office of Dr. Freeman, they cannot now be heard to complain that they are guiltless because of the fact that the postoffice

inspectors chose this method of discovering their culpability.

The case of *Hughes v. United States*, 231 Federal 50, heretofore cited, is a case wherein all of the evidence introduced at the trial was of the identical character of that used in this trial, to-wit: decoy letters from postoffice inspectors and answers thereto from the office of the defendants, and the court in that case upheld such procedure in the following language:

“The defendants N. A. Hughes, T. W. Hughes, August Marable, J. F. Allen, and Edward Parlan are shown by the government’s evidence to have been physicians and principals in the business that was being conducted at the two locations mentioned as the seats of the conspiracy, and the jury were authorized to infer from the evidence that these defendants were responsible during the period covered by the years 1912 and 1913 for whatever was being done on the premises at each location, and that they shared or were to share in the profits of the transactions knowing their actual character. It was also open to the jury to infer from the evidence that the purpose of the business that was being conducted during the period mentioned at those places, was not the *bona fide* treatment of disease, but a scheme to secure money from patients with no purpose to treat them in good faith as promised, but merely as a pretext for taking the money solicited. The correspondence between the inspectors and the defendants, introduced in evidence, was of a character, which justified the jury in drawing the inference of bad faith and fraud, if they saw fit.

The fact that only fictitious transactions, based on decoy letters written by inspectors, were in evidence, and that no money is shown to have been received by the defendants, did not prevent the jury from inferring the existence of the conspiracy charged in the first count or the fraudulent scheme charged in the remaining three. We think there was no error in submitting the cases of these defendants to the jury." (231 Federal 54, 55.)

The cases are almost innumerable in which the courts have decided that where there was reason to believe that the postal laws were being violated, it was proper for the postoffice inspectors to test the suspected persons, by the use of test letters, and the fact that counsel for appellants have been unable to cite a single case to this court in support of their position that such correspondence as this is not sufficient to sustain a verdict of guilty, is evidence enough that the courts have uniformly looked upon it as a justifiable and legal manner of ascertaining and proving violations of the postal laws.

(e) This is an alleged error not assigned in the assignment of errors and we have heretofore called the court's attention to the difficulties attending an argument based upon an alleged error not included in the assignment of errors. However, there is no plain error in the ruling of the court complained of under the letter "e". The objection apparently was to the qualifications of Dr. Frank L. Cunningham in that he was an osteopathic physician and that he was not per-

mitted, under the laws of the state of California, to administer medicines. Counsel in their brief, however, have not undertaken to point out any law of the state of California prohibiting an osteopath from treating the diseases concerning which Dr. Cunningham was testifying, and we are frank to say that we do not believe there is such a law. We have investigated the matter and find no such provision of any law of the state of California. The testimony was admissible to show that the diseases in question could not be treated successfully by osteopathy without personal contact between physician and patient.

(f) This also is an alleged error not assigned in the assignment of errors. The answer to the question propounded to Dr. Whitman, set out on page 23 of the brief of appellants, is not set out in their brief. They complain in their brief that it would be impossible for the doctor to correctly answer the question propounded as it called for conclusions which he was unable to give. The doctor's answer to said question, set out on page 101 of the transcript, was as follows:

“While in that paragraph (referring to the symptom blank) many of those things, of course, the patient would be able to tell but he would not be able to tell whether he had clap or acute gonorrhea and on reading the second list as to gleet or chronic gonorrhea or stricture or of the third list as to syphilis or blood poison I will answer your question as to the patient's ability to decide. It is not possible to diagnose gonorrhea without the use of a microscope. The positive diagnosis of syphilis is the blood test called the

Wasserman test. The ordinary layman by self-examination cannot tell whether or not he has gonorrhea or syphilis; that is the ordinary layman who is not familiar with the microscope. The only way to distinguish these diseases is the microscope for the gonorrhea and the Wasserman test for the syphilis,—the two diseases are different.” [Transcript, pages 101 and 102.]

We respectfully submit that there is nothing in the answer which in any wise oversteps the rules of evidence in regard to expert testimony.

Counsel also complain of the following question which was asked Dr. Whitman as an expert: (The qualifications of Dr. Whitman as an expert are apparently unquestioned)

“Now, doctor, would you say from your experience in doctoring patients that it would be possible to successfully treat patients through the mails upon questions answered by them, without personal contact with the patient in the diseases, the so-called genito-urinary diseases?” (Brief of appellants, page 24.)

The answer to this question was as follows:

“A doctor who reads the patient’s description of what he had could not tell what the patient had without a personal examination.” [Transcript, page 102.]

We do not follow counsel in their argument upon this point as, beyond any doubt, if it were impossible for a physician to determine from a patient’s own diagnosis of his symptoms what the condition of the

patient was, then it would certainly be evidence of bad faith on the part of the person so representing to the public that he could treat patients afflicted with genito-urinary diseases without making a personal diagnosis.

(g) This alleged error is also unassigned in the assignment of errors, and has to do with the refusal of the court to allow postoffice inspector Webster to testify on cross-examination over the objection of counsel for the government as to whom he interviewed in the preparation of the evidence in this case. Obviously the good faith of these appellants could neither be established nor impeached by postoffice inspector Webster's conduct in interviewing any one concerning this case. The question propounded, and to which the court sustained an objection, was as follows:

“Q. How many people have you, in your investigation which you have testified about, talked to personally or written to in regard to the treatment received from that office?” [Transcript, page 106.]

The number of people Webster interviewed in this case has absolutely nothing to do with the intent of the defendants to defraud which is the material issue in the case, and the court was correct in his ruling in denying counsel the right to cross-examine Mr. Webster in any such manner.

(h) This alleged error also is unassigned in the assignment of errors. This is similar to objection “f.” Counsel have cited no authority in support of their position on either of these points, and we think we are justified in the assumption that had there been

authority to support their position they would have cited the same.

(i) This alleged error also is unassigned in the assignment of errors. Dr. Freeman, on page 110, *et seq.*, of the transcript, was permitted to describe the office at 327½ South Spring street and its equipment, but when asked to compare this equipment with that of other offices the government objected and the objection was sustained. Counsel, in their argument, state:

“It will be noted that the scheme charged was to defraud the people; that they would cure certain diseases in a certain way—then, was not the fact that they were fully equipped in the office for the treatment of such diseases by the use of a static machine and a supply of medicines, etc., competent as bearing on the question of their good faith in being in the business? We think this, on the ordinary principle of reasoning, is sound, and that the court erred in not permitting this examination.” (Appellants’ brief, page 27.)

Counsel were permitted to prove all of the points mentioned in their argument in this alleged error, and it was only the comparison with other offices that was ruled out by the court.

(j) Under this head, counsel discussed what they term “the most serious error on the question of admission and rejection of evidence.”

We desire to call this court’s attention to the artful manner in which counsel for appellants endeavored to mislead the court below and the trial jury as to the

materiality and the weight of letters, the rejection of which as exhibits form the basis of this assignment of error. It will be seen from portions of the transcript quoted in our argument hereafter that counsel well understood that the letters were not admissible if the truth as to the time, place and circumstances under which they were written and received by the defendant Freeman were disclosed. As will appear, the letters were written by Doctor Freeman and received by him after he had left the office at 327½ South Spring street and the employ of his co-conspirators and had ceased all association with them and opened an office of his own at Third and Broadway, in the city of Los Angeles. The conspiracy then, so far as the same might be affected by any acts of Freeman, was at an end. The extracts of the testimony hereafter quoted show that counsel, fully realizing this, resorted to a systematic scheme of evasion in their method of offering this testimony and their discussion thereon in the court below and, now, in their argument before this court. Counsel perhaps felt driven to this extremity by reason of their realization of the weakness of their case and by the belief that if they could not predicate error upon the action of the trial court in denying the admission of these letters then their case would be lost.

To begin with, the defendant Giddeon M. Freeman testified in direct examination, on page 110 of the transcript, that he knew the defendants Drs. Holsman, Giles and Joslin and Mr. Sims and that he was connected with the office at 327½ South Spring street in 1912 where he worked on a salary for Drs. Holsman,

Joslin and Giles. On page 112 of the transcript (bottom of the page) he testified that he left the employ of Drs. Holsman, Giles and Joslin the first week in April, 1913, and opened an office at Third and Broadway. Dr. Frank C. Fuller testified, on page 73 of the transcript, that Dr. Freeman left the offices at No. 327½ South Spring street some time in April, 1913. The indictment charges that the conspiracy was between Charles K. Holsman, Henry L. Giles, Gideon M. Freeman, Ambrose C. Sims and Otto C. Joslin. Obviously the conspiracy alleged in the indictment could in no wise be affected by the act of any of the conspirators after the termination of the conspiracy, and what Dr. Freeman did individually after the first week in April, 1913, when he terminated his connection with the office at 327½ South Spring street and opened an office of his own at Third and Broadway, could not in any wise affect or throw light upon the conspiracy between himself and the other conspirators named in the indictment while they were associated together at 327½ South Spring street.

On the trial of the case before the court below, counsel for defendants, Mr. Stone, asked Dr. Freeman the question:

“Q. Did you preserve, and have you your correspondence for the year 1913?

“A. I have, yes.

“Mr. Stone: Do you want to examine this?

“Mr. Moody: Is this correspondence of the office at Third and Broadway?

“Mr. Stone: Yes.

“Mr. Moody: No, I don’t want to examine it. It has nothing to do with this case.

“Mr. Stone: Q. I show you here, doctor, a number of letters and replies in May, 1913, relating to the business of the office. Will you kindly examine that exhibit for the month of May, 1913, and state whether or not those are the original letters received at the office, and copies of replies given by you in regard to any business of the office or the treatment of any patient?

“Mr. Moody: Is this the office at Third and Broadway?

“Mr. Stone: That is for the witness to say, where it is. It is immaterial where it was. The conspiracy is alleged to be January 1st, 1912, and from that time on, continuous, Your Honor.

“Mr. Moody: During the times mentioned in the indictment?

“The Court: Well, this question, Mr. Moody, is preliminary. Haven’t you examined those documents?

“A. Yes, sir, I know them.

“The Court: Well, you can answer the question then.

“A. Yes, sir, these are parts of my records.

“Q. By Mr. Stone: That is for that month; is that correct?

“A. Yes, sir.

“Mr. Stone: We offer those in evidence, if Your Honor please.” [Transcript, pages 113 and 114.]

It will appear from this portion of the transcript that the letters offered in evidence were from the office

at Third and Broadway operated in the month of May, 1913, by Dr. Freeman after he had severed his connection with the other defendants in this case.

It will also be observed that Mr. Stone was very reluctant to bring before the court or the jury the location and the personnel of the office from which this correspondence originated. In his argument on page 115 of the transcript, Mr. Stone never once informed the court that these letters were the letters of Dr. Freeman from his own office at Third and Broadway after he left the employ of his co-conspirators at 327½ South Spring street. And on page 116 of the transcript, near the bottom of the page, he said to the court:

“Can it be stated that they can pick out a few decoy letters that were sent to *them*, and to which answers have been made, without *their* knowledge, as the evidence appears here, and then all the letters pertaining to *their* business showing *they* were doing an honest business, can be cut out?” (Italics ours.)

Which is, in effect, an allegation by Mr. Stone that these letters he was offering in evidence were the letters of all of the defendants or the replies to letters sent out by the defendants. On page 117 of the transcript, the following conversation between Mr. Stone and the court is set out:

“The Court: As I understand you, Mr. Stone, these letters were written by this witness to patients of his?”

“Mr. Stone: I will correct Your Honor in this, these letters are letters that he received from different people with whom he was dealing, and copies of his replies.

"The Court: When he was in *the* office?

"Mr. Stone: Yes, sir.

"The Court: Under the employment of *Holsman*?

"Mr. Stone: Well, while he was in the office. His name is signed to them.

"The Court: I say, while he was in the employment of *Holsman*?

"Mr. Stone: *Yes, sir*, while he was in *the* office anyway. It does not make any difference whose employment he was in.

"The Court: Well, I think it does make a difference in any event." [Transcript, page 117.] (*Italics ours.*)

It will be seen from this conversation that when the court asked Mr. Stone if these letters were received by Dr. Freeman while he was in *the* office, Mr. Stone answered: "Yes, sir." When the court further interrogated him "under the employment of *Holsman*?" Mr. Stone evaded a direct answer and stated: "Well, while he was in the office," and the court again asked Mr. Stone, as follows: "I say, while he was in the employment of *Holsman*?" and Mr. Stone answered, "Yes, sir, while he was in the office, anyway." Thus again it will be seen that Mr. Stone sought to conceal the fact that these letters emanated from Dr. Freeman's individual office at Third and Broadway after he severed all connections with the office at 327½ South Spring street, when his client testified on direct examination that he was no longer in the employ of Dr. *Holsman* at the time of this correspondence. On page 117 of the transcript, Mr. Stone said to the court, in

“The indictment charges they conspired to defraud various people by the use of the mails, and we want to show by every man that had correspondence with him that he never intended to defraud him; that the letters we received from those people, and every letter sent to them in every instance stated they must come to the office for examination, in contravention of the things alleged in the indictment.”

Whereas the indictment never related or pretended to relate to Dr. Freeman’s business at Third and Broadway. The court thereupon said: “It seems to me, Mr. Stone, they are self-serving declarations and not admissible”; which in itself was ample ground for the refusal of the admission of this correspondence, in addition to the further ground that it was totally incompetent, irrelevant, and immaterial and without the issues as confined in the indictment.

At the bottom of page 118, Mr. Stone stated:

“Mr. Stone: Yes. We offer first, if Your Honor please, we might offer them as one exhibit, a series of letters and copies received from patients, people with whom *these defendants* were dealing in May, 1913, as Defendant’s Exhibit No. 1, there being about 30 or 40 letters.” (*Italics ours.*)

Whereas he well knew, and the transcript abundantly shows, that the letters offered in evidence were not the letters received from patients with whom *these defendants* were dealing in May, 1913, but were letters from patients with whom Dr. Freeman individually was dealing from his office at Third and Broadway

after he had severed all connections with the other conspirators mentioned in the indictment.

On page 119 of the transcript, the government made another objection to these exhibits which was, in our opinion, as good as our former objections, which was that they were privileged communications, namely, communications between a doctor and his patients in connection with their private diseases and the doctor had no right to divulge such correspondence without the privilege being waived by the writers of the letters. This objection was also sustained by the court.

Then follows in the transcript, pages 119, *et seq.*, the letters offered by Mr. Stone, and a casual glance at the date of every one of them will show that they are all dated subsequent to the severing, by Dr. Freeman, of his connection with his co-conspirators. And it will be further noted that where Dr. Freeman's address is given in any of these letters, it is 254 South Broadway or the corner of Third and Broadway and not 327½ South Spring street.

On page 179 of the transcript, at the bottom of the page, the following proceedings are set out:

"Mr. Stone: We next offer in evidence the entire correspondence of the office for June, 1913, being original letters received from patients and the copies of the replies, showing the manner in which the office was conducted.

"Mr. Moody: May I ask, Mr. Stone, if you will include in your offer—You say 'from the office.' Will you include in your offer from what office, giving the location of the office?

“Mr. Stone: Well, I deem the location of the office immaterial on this matter, if they were doing the things you claim. Personally I don’t know, but they were from Los Angeles.

“The Court: I would suggest, gentlemen, I would not think the location of the office is material.

“Mr. Moody: The only reason I had in making that suggestion was that this witness testified he severed his connection in the spring of 1913 and started in an office of his own, and manifestly what he did by himself would have nothing to do with the conspiracy.

“The Court: Of course, that is right, too.

“Mr. Moody: That is the reason I wanted him to say whether it was from his own office, or the office of the other parties.” [Transcript, pages 179 and 180.]

Again, it will be seen that despite the efforts of counsel for the government to establish the origin of these letters, Mr. Stone again evaded the question and refused to put in the record the office from which this correspondence originated. And, in the offer by the counsel for defendants of all of the letters included in Exhibits 1 to 8 he did not at any time disclose to the court willingly the fact that these letters were the private correspondence of Dr. Freeman.

So much for this correspondence before the lower court.

Counsel for appellants in their brief on page 34 argue, in part, as follows:

“The *defendants* identified, by the defendant Freeman, while on the witness stand, *their* correspondence

for several months beginning with May, 1913, the same being office copies of the letters *they* sent out, and the original replies thereto, for the purpose of showing the nature of the business transacted by *the defendants*, which was charged to be fraudulent over this period of time.” (Italics ours.)

It will be seen that here again counsel argue that the correspondence was that of *the defendants*, being office copies of the letters *they* sent out, which was entirely the opposite from the real situation.

We do not think it is necessary to further discuss this assignment of error nor to cite authorities in support of the ruling of the court below.

No. 3.

Under this number counsel for appellants discuss the instructions—both those refused and those given by the court below.

On page 44 of their brief, counsel begin their argument on the instructions refused. They complain that the first requested instruction was erroneously refused. The first instruction requested was as follows:

“I instruct you in this case that the gist of the allegations against the defendants is a conspiracy and the doing of an act or acts, to-wit, the mailing of letters set out in the indictment, in furtherance of the conspiracy.

“You cannot find the defendants, or either of them, guilty of a conspiracy in the case, even though you believe such has existed as charged in the indictment, unless you further believe from the evidence, beyond a

reasonable doubt, that the defendants, or one of them, mailed or caused to be mailed the letters, or one of the letters, set out in the indictment, in furtherance of the alleged conspiracy; because a conspiracy under the United States laws is not a crime, though it is an agreement or understanding to do an unlawful act or acts, unless the overt act or one of them alleged in the indictment is actually committed by the defendant, or one of the defendants, after the conspiracy is formed and in furtherance thereof, and hence, unless you believe from the evidence in this case, beyond all reasonable doubt, that the defendants had entered into a conspiracy, as alleged in the indictment, and further, that the defendants, or one of them, in furtherance of said conspiracy, actually mailed, or actually caused to be mailed, the letters, or one of them, set out in the indictment, then it will be your duty to acquit the defendants.”

The court instructed the jury substantially as requested in this instruction by counsel for appellants in instructions 5, 6 and 9 set out on pages 196, 197 and 199 of the transcript.

Requested instruction 2, the refusal to give which counsel discuss on page 45 of their brief, was amply covered in instruction No. 10, transcript, page 199, given by the court, which reads as follows:

“The court further instructs you that, while the acts or declarations of a co-conspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during

the existence and in furtherance of the unlawful combination when proven, is not only evidence against him, but is evidence against the other conspirator who, if the combination be proven, is as much responsible for such act or declaration as if done or made by himself.

“You must not, however, permit yourselves to use against either defendant, anything said or done outside the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt, that at the time the things were said or done a conspiracy existed between the party saying or doing the things and the defendant to be affected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy.”

We have before cited this instruction relative to Government's Exhibit A-1, discussed in the brief of counsel for appellants in point No. 2, subdivision b.

Requested instructions 3, 4 and 5 were nothing more or less than an unwarranted endeavor to bring this case within the rule laid down in the cases of *Woo Wai v. United States*, 223 Federal 412, and *Sam Yick, et al., v. United States*, 240 Federal 60, in both of which cases this court took the view that the government officers took such an active part in the conspiracy itself that it would be against public policy to sustain a conviction thereon.

In the case at bar, the postoffice inspectors were never known to the defendants as officers, or otherwise,

and the decoy letters were used merely for the purpose of ascertaining whether or not the law was being violated.

This procedure has uniformly been upheld by the Federal courts. A few of the cases in which convictions have been sustained on such test letters as these are as follows:

- Rosen v. United States, 161 U. S. 29;
- Price v. United States, 165 U. S. 311;
- Andrews v. United States, 162 U. S. 420;
- Grimm v. United States, 156 U. S. 604;
- Montgomery v. United States, 162 U. S. 410;
- Scott v. United States, 172 U. S. 343;
- Goldman v. United States, 220 Fed. 57;
- Hughes v. United States, 231 Fed. 50. Cited at length on this point above.

In the Goldman case, *supra*, the court said:

“There is another objection to these letters which is deserving of attention. The letters were decoys and were written at the instance of a postoffice inspector. The writer of the first letter was not in the employ of the government, though the writer of the other was. The letters bore the address called for in the advertisement, were duly stamped, and the inspector placed them in box 14, Station D. The superintendent of the station, pursuant to the request of the inspector, notified Goldman by telephone that two letters were there. Goldman went there to the postoffice and took the letters from the box, opened and read them, and as one of the witnesses said, “was in the act of tearing up the envelopes” when the officer arrested him. If

these officials adopted and pursued this course upon reasonable grounds to suspect Goldman of misusing the mails, their conduct was under well-settled principles, justifiable, and the offense was committed; if no such grounds existed, neither their course nor the conviction can be sanctioned. *United States v. Wright* (D. C.), 38 Fed. 106, 109, per Brown and Jackson, J. J.; *Grimm v. United States*, 156 U. S. 604, 609, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; *Goode v. United States*, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297; *Rosen v. United States*, 161 U. S. 29, 42, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Montgomery v. United States*, 162 U. S. 410, 411, 16 Sup. Ct. 797, 40 L. Ed. 1020; *Andrews v. United States*, 162 U. S. 420, 423, 16 Sup. Ct. 798, 40 L. Ed. 1023; *Price v. United States*, 165 U. S. 311, 315, 17 Sup. Ct. 366, 41 L. Ed. 727; *Hall v. United States*, 168 U. S. 632, 637, 18 Sup. Ct. 237, 42 L. Ed. 607; *Scott v. United States*, 172 U. S. 343, 349, 350, 19 Sup. Ct. 209, 43 L. Ed. 471; *Bates v. United States* (C. C.), 10 Fed. 92, 94, 95, per Drummond, C. J.

“The evidence tends to justify the course taken by the postoffice officials; in other words, it seems to have been an effort to detect, and not to induce commission of a crime. In the interval between the publication of Goldman’s advertisement and the preparation of the letters, the inspector had been told of Goldman’s purposes. During that interval the woman who wrote the first letter set out in the statement had conversed with Goldman on the subject of his scheme, and he had told her just what it was. This

occurred for the most part in the presence of a third person, a man, and the man and woman testified at the trial, without objection, that Goldman told them that he had received 10 or 12 letters in answer to his advertisement, though Goldman testified that he said they were applications, not letters. It was from the man, who was present at the interview, that the inspector received his information. In view, then, of the verdict, we cannot say that Goldman's acts of taking and receiving the two letters in issue were any the less an offense because of the fictitious character of the letters. It was not necessary, in order to establish the offense, to show that the nature of the letters so received was such as effectively to aid in working out Goldman's scheme. It was enough if, having devised his scheme, he received the letters with the purpose of thereby executing or attempting to execute the scheme. *Durland v. United States*, 161 U. S. 307, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; *Weeber v. United States* (C. C.), 62 Fed. 740, 741, per Brewer, Circuit Justice; *O'Hara v. United States*, 129 Fed. 551, 555, 64 C. C. A. 81 (C. C. A. 6th Cir.); *Lemon v. United States*, 164 Fed. 953, 957, 958, 90 C. C. A. 617 (C. C. A. 8th Cir.); *Walker v. United States*, 152 Fed. 111, 115, 81 C. C. A. 329 (C. C. A. 9th Cir.)." (220 Federal 62, 63.)

It will thus be seen that the case at bar is substantially different from the *Sam Yick* and the *Woo Wai* cases cited by counsel for appellants wherein the government officials participated in the conspiracy to such a degree that it was held by the court that the defend-

ants could not be charged with having originated the scheme.

The stipulation set out on page 87, *et seq.*, of the transcript is in part as follows:

“It is further stipulated that the person writing said letters was guided by the language contained in an advertisement circulated in the Los Angeles Examiner July 14, 1912, over the name of Dr. G. M. Freeman and other advertisements appearing in newspapers published and circulated in said city of Los Angeles.” [Transcript, page 88.]

Thus the letters of the postoffice inspectors were merely test letters to discover whether or not the business carried on through the mails by the defendants in pursuance of their advertisements set out as Plaintiff’s Exhibit No. 2, page 81, *et seq.*, of the transcript, was a legitimate or an illegitimate business.

Instructions 12 and 13, given by the court and set out on pages 200 and 201 of the transcript, correctly state the law as applicable to this case. Requested instruction No. 5, which was refused by the court, is hardly a correct statement of the law regarding the use of decoy letters. Insofar as it is a correct statement of the law it is amply covered in instruction No. 12, given by the court and set out at page 200 of the transcript, wherein the court said:

“It is lawful that what is known as decoy letters, such as the letters sent by the postoffice inspector in this case for the purpose of procuring an answer from the defendants, or one of them, may be used for the

purpose of ascertaining whether the person addressed is engaged in the commission of a criminal offense against the laws of the United States. If at the time the said decoy letter or letters were mailed to the defendants, or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment, and the defendants in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy.”

This instruction is thoroughly in accord with the Hughes case, *supra*.

Requested instruction No. 7, while not given in the precise form requested by appellants, was sufficiently covered in the charge given by the court, particularly in instruction No. 10, set out at page 199 of the transcript, and instruction No. 8, set out on page 198 of the transcript, and that part of instruction No. 3, given by the court, which reads as follows:

“Before you can convict either of the defendants it must be shown that he conspired with one of the other defendants named in the indictment.” [Transcript, page 196.]

and instruction No. 6, on page 197 of the transcript.

Instruction No. 9, set out on page 199 of the transcript, sufficiently covers that portion of requested in-

struction No. 7 relative to what constitutes responsibility for the mailing of letters in furtherance of the conspiracy.

What is said in reference to requested instruction No. 7 is equally applicable to requested instructions No. 9 and 11.

No. 4.

Under this number counsel for appellants discuss the instructions No. 12 and 13 given by the court. They argue that instruction No. 12 is inconsistent, contradictory and misleading, particularly because the court instructed the jury that the "conspiracy with which the defendants are charged must be proven to exist independently of any inducement to enter therein by any government official" and also "in other words, if the conspiracy existed it does not matter what the government officers did in order to procure evidence to prove it." These statements are not contradictory in any manner nor are they misleading.

The letters sent by the postoffice inspectors are admitted in the stipulation set out in the transcript to have been "guided by the language contained in advertisements circulated in the Los Angeles Examiner," and therefore were nothing more or less than a test to discover whether or not a conspiracy to violate the laws of the United States was being operated, and this was distinctly upheld as a proper proceeding to discover whether such a conspiracy were in progress or not in the Hughes case, *supra*. The evidence in the transcript does not disclose that the officers acted

contrary to the established rules laid down in the cases heretofore cited as authorizing decoy letters, and therefore, under the facts of this case, the instruction, "it does not matter what the government officers did in order to procure evidence to prove it," was not erroneous.

In their argument on instruction No. 13, given by the court, counsel base their argument upon an entirely erroneous premise, namely, that the government officers induced the commission of this crime. The instruction of the court, "you are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action," is a correct statement of the law under the decisions above set out, and answering such letters does not constitute an inducement of the crime by the post-office inspectors. Therefore there is no conflict between these two instructions.

Again counsel are mistaken in their argument that the decoy letters were the only evidence in the case relied on by the government. The advertisement introduced in evidence as Plaintiff's Exhibit No. 2 was a very material and important point relied on by the government, in that in its promises it was so extravagant that it immediately invited suspicion that it was nothing more or less than a bait to catch the unwary and unsophisticated. The Hughes case, *supra*, held that decoy letters and answers alone were sufficient, while in this case we have other evidence of sufficient strength to warrant a jury in believing, when taken with the answers to the decoy letters, that the con-

spiracy was established independently of the decoy letters.

The argument of counsel, on page 51, *et seq.*, of their brief, that the court erred in instructing the jury that “if a person by so responding to such decoy letters violated the law of the United States,” etc., in that it was not a question of whether or not the response to the decoy letters violates the law, but whether or not there is a criminal conspiracy, is unsound for the reason that the court had theretofore instructed the jury that a material and necessary part of the conspiracy was the use of the mails, and such use of the mails when proved became an integral part of the conspiracy, and therefore the conspirators were violating the law by sending such responses through the mails.

Therefore, we respectfully submit that the instructions of the court covered the requested instructions of appellants in every material respect, and that they were in entire uniformity with the rules of test or decoy letters laid down in the cases hereinbefore cited.

Respectfully submitted,

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United States Attorney;

CLYDE R. MOODY,

Assistant United States Attorney;

WM. FLEET PALMER,

Assistant United States Attorney;

Attorneys for Appellee.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Charles K. Holsman and Gideon M. Freeman, <i>Plaintiffs in Error,</i> <i>vs.</i> United States of America, <i>Defendant in Error.</i>	}
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Petition of Gideon M. Freeman, Plaintiff in Error, for a
Rehearing.

M. E. MEADER,
Attorney for Gideon M. Freeman, Plaintiff in Error.
C. W. PENDLETON,
Of Counsel.



No. 3015.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUTT.

Charles K. Holsman and Gideon M. Freeman, <i>Plaintiffs in Error,</i> <i>vs.</i> United States of America, <i>Defendant in Error.</i>	}
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**Petition of Gideon M. Freeman, Plaintiff in Error, for a
Rehearing.**

Gideon M. Freeman respectfully presents this, his petition for a rehearing of the above-entitled matter, upon the facts and grounds hereinafter stated:

I.

**The Demurrer of the Appellants to the Indictment
Against Them Should Have Been Sustained.**

The indictment in no way alleges fraudulent intent on the part of the defendants in doing that with which they are charged.

The opinion handed down herein correctly states the law applicable in this case when it says "where the facts alleged necessarily import willfulness, the failure to use the word itself is not fatal." (Van Gesner v. United States, 153 Fed. 46.) However, in this case the facts alleged *do not* necessarily import willfulness. There must either be a *positive* allegation of intent, or the facts alleged must *necessarily* import such willfulness. The only allegation of intent in this case is *negative*, not *positive*. (Brief of appellee, page 10, lines 2 to 16, inclusive, quoting from indictment.) Exclusive of the Van Gesner case, which we respectfully submit supports our contention, the only case advanced by the Government is that of Hughes v. United States, 231 Fed. 50, which is not identical with the case at bar. There the defendants were charged with fraudulently *soliciting* and *receiving* money; here they are charged with *conspiracy*. The court here says (opinion, page 3), "and this with the ultimate purpose of getting from such persons money to which the defendants were not entitled." We submit that the indictment *does not allege this or show it*. Nor does it show that the acts were done for the purpose of getting money "by reason of not having rendered any service whatsoever." The court holds that *this* shows the *intent*, obviating the necessity of an allegation; and we earnestly urge this as manifest error. There is no contradiction of the law as set up in appellants' brief, page 7, lines 3 to 10, inclusive.

The special features of the demurrers of both defendants were not urged at the hearing of this matter,

as counsel were of the opinion that the general demurrers were good and sufficient. We desire here to call the particular attention of the court to these demurrers [Trans. pp. 15 and 19], the special features of which are in themselves an argument in their favor.

II.

The Trial Court Erred in the Admission and Rejection of Certain Evidence.

1. The first assignment of error, in the cross-examination of Dr. Fuller, was the refusal of the trial court to permit the witness to testify concerning the equipment, etc., of the office. The court here, after saying that the trial court has a wide range of discretion respecting cross-examination and "it is by no means apparent that the exercise of such discretion in thus curtailing the examination affected the defendants injuriously," further states that "the manner of equipment, etc., of the office had but little bearing, if any at all, on the subject," and thus dismisses the point. The defendants are charged with conspiracy to use the mails to defraud, and the very foundation of the Government's case is an intent to defraud. Certainly it cannot be said that if the witness had testified that the office had *no* equipment necessary to treat the diseases of men, it would not have a tremendous effect on the minds of the jury in determining the question of whether or not the defendants acted in good faith. Can it be said, therefore, that the converse is not true, and that the answer of the witness has "little bearing, if any at all, on the subject." The necessary implication,

from all the testimony in the case relative to the business and office of the defendants, is that Dr. Fuller was granted immunity from indictment by reason of his being a Government witness. In view of this, it was manifestly unfair to so limit his cross-examination that in order to bring out the sought-for facts it would be necessary for the defendants to make him their own witness. The attitude of the Government attorney, so clearly expressed in his own language in appellee's brief, page 13, lines 14 to 18, inclusive, to-wit: "It was the privilege of the prosecution, and exercised as such in this case, to limit the direct examination to certain matters only so that counsel for the defendants would be unable to substantially make Dr. Fuller their witness by their cross-examination of him," should be severely censured. It has always been recognized that it was the sworn duty of the Government attorney to bring all necessary facts before the court and jury to see that justice might be done; and not by subterfuge and by taking advantage of a technical point of evidence, to substantially prevent the defendant from bringing pertinent facts to the attention of the jury. The jury are entitled to all the facts, and if by its rulings the trial court assists the Government attorney in preventing pertinent facts from being brought before them, it is reversible error.

2. The second assignment of error was the admission in evidence over defendant's objections, of a certain alleged affidavit, marked Government's Exhibit No. 1A. This was objected to as being incompetent, irrelevant and immaterial; and second, that it was mere

hearsay as to one of the defendants. In the first place, there is nothing but the mere statement of an over-zealous counsel that this was an affidavit required to be made by the laws of the state of California, and it *does not show* that it had been filed with the State Board of Medical Examiners of the state of California on September 11, 1911. The attention of the court is called to the fact that the transcript, page 79, line 24, reads as follows: "of the state of California....., secretary." No signature of any secretary, or his deputy, or in fact of any person appears. Further, counsel for the Government proceeded upon the theory that this affidavit was made by one of the conspirators during the existence of the conspiracy, and for this reason urged its admission, and *upon this ground* the trial court admitted it. This was unquestionably error for it is a well founded and uncontroverted rule of evidence that a statement of one of the alleged conspirators cannot be admitted against another alleged conspirator until the Government has first proved a *prima facie* conspiracy. In this case there was no *prima facie* proof of a conspiracy at the time this affidavit was offered in evidence, the fact being *that at no time* during the trial of the cause was there *prima facie* case proven.

3. The next error assigned is the admission of two bound volumes of the Los Angeles Examiner. Again we find the court passing briefly over the objection in these words: "It is not at all apparent that their admission proved harmful to the defendants." No foundation at all was laid for the introduction of these ex-

hibits. No evidence was given to show that even any one connected with defendant's office wrote or dictated the writing and handled the publication of the advertisements spoken of. Most certainly the fundamental rule of evidence that a proper foundation must be laid for the introduction of documentary evidence has been violated, and can it be said that such violation, i. e., the admission of these large volumes of a well known newspaper, did not have any effect upon the minds of the jury? What would have been the effect if the volumes, upon being examined, had *failed to reveal* any advertisements of Dr. Freeman? Would not their admission have proved "harmful" to the Government?

4. Passing over for the moment the points in appellants' brief marked (e), (f), (g), (h) and (i) we come to what we consider one of the most vital errors in the case, to-wit: the rejection of the office correspondence of the defendant Freeman. Admission thereof was objected to on two grounds, first—because they were incompetent, irrelevant and immaterial; and second—because they were privileged communications and the privilege was not waived by the addressee or the writer of the letters. No direct ruling was made on either of these points, but the trial court refused to admit them on the ground that they were self-serving. The Appellate Court in its opinion merely stated that the letters were self-serving and not competent in the case. On the question of these being self-serving declarations and therefore not admissible, it is desired to call the atten-

tion of the court to Wigmore on Evidence (1904 Ed.), Vol. III, page 2231, where it is said:

“(4) Statements after the act, stating the past intent or motive at the time of the act, are of course inadmissible under the present exception (statements by an accused person), though usable against the accused as admissions. But subsequent statements predicating a then existing state of mind are properly admissible under the present exception. No question is made about this when they are offered against the accused, because they are at any rate available as admissions. But they should be equally admissible in his favor. In both cases the object is to ascertain his subsequent state of mind, and thence to infer his state of mind at the time of the act. It is true that these declarations may not be thought to fulfill the requisite of the present exception that there should be no apparent motive to deceive; but this argument, as before, seems to involve the assumption of guilt.”

And also on page 2273, Sec. 1765:

“There is no principle of evidence especially excluding ‘self-serving’ statements by an accused person or by any one else. The hearsay rule excludes all extrajudicial assertions; and therefore the only inquiry need be whether such assertions are covered by some exception to that rule, or whether utterances amenable to it are evidential in any indirect way apart from their assertive value. There are one or two instances in which such a use of an accused’s utterances partakes somewhat of the reasons for the present exception.”

Dr. Freeman had testified, and such testimony was uncontroverted, that he followed up exactly the same

plan as to the mail and conduct of the mail matters in his office at Third and Broadway as he had done when he was in charge of the old office on Spring street. [Transcript, pages 112 and 113.] Both of the postoffice inspectors testified that it was not until 1914 that they called on Dr. Freeman and discussed with him the decoy letters, etc., and that he told them he knew nothing about the letters and that he had never seen them before. [Transcript testimony of C. E. Webster and C. S. Ranger.] This was the first time anything had ever been brought to his knowledge intimating that there was anything wrong with the conduct of the old or his new business. It is preposterous to say that his *bona fide* letters were written with a view to counteract any mail-fraud charges. This would be a presumption that this correspondence was false and fraudulent, knowingly so, and would negative the presumption that follows the defendant in a criminal case throughout all of the case, i. e., that he is *innocent*. And could even the overzealous Government attorney in the present case, by any stretch of his imagination, think that *all* of the doctor's *bona fide* patients would write letters like these at his direction and solely at his request and for such a purpose alone?

5. As to the objection that these were privileged communications, etc., this objection is groundless as shown by the Code of Civil Procedure of the state of California, Sec. 1881, Sub. 4, which is the rule followed by the federal court in the state, and which reads as follows: "A licensed physician or surgeon cannot, without the consent of his patient, be examined *in a civil*

action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient," etc. This is the only time the question of privilege can be raised, and the court will note that this may be done ONLY IN A CIVIL ACTION. Finally as to the fact of the competency of the evidence in question. Counsel for the Government in his brief on page 24 says: "We desire to call this court's attention to the artful manner in which counsel for appellants endeavored to mislead the court below and the trial jury," etc. In our experience in the practice of law we have never seen or heard of any case where the prosecutor in a criminal case seemed so doggedly persistent and objected so strenuously and to such length to prevent all the facts and to keep the whole truth from reaching the jury. It is indeed unfortunate that a *verbatim* record of this case could not have been sent up on the appeal. And it is additionally unfortunate that the record does not show that the correspondence of the old office COULD NOT have been produced at the trial as it was not in existence, for such fact was brought out at the time. Putting aside this point, which would clearly admit these letters under the "best evidence" rule, we find the following to be the case. Here is a defendant in a criminal case charged with a violation of section 215, to-wit, a device or scheme to defraud by use of the mails. It is attempted to show by admittedly decoy letters that the defendant, with certain others, was engaged in a criminal conspiracy in the use of the United States mails. There is no more definite or certain way to tell whether or not a man is

engaged in a criminal conspiracy in the use of the mails than by the production of the correspondence which he actually had, NOT WITH FICTITIOUS PERSONS BY USE OF ADMITTEDLY DECOY LETTERS, but with his BONA FIDE patients, or, in other words, the PEOPLE WITH WHOM HE WAS ACTUALLY DEALING. The very foundation of the Government's case is an intention on the part of the defendants to defraud. An intention to deceive by use of the mails. Now how is the matter of intention determined? By decoy letters solely, which it is shown the defendant never saw before the postoffice inspectors showed them to him, or by FALSE STATEMENTS by the Government attorney that these letters were GENUINE and that the defendants had been guilty of defrauding people and persons, etc.? Or is it not true that there is nothing that would more clearly show the intention of the defendant than his actual correspondence with people with whom he was dealing? It is respectfully submitted that the record fails to disclose any evidence of the commission of, or attempt to commit, a crime except as disclosed and induced by the so-called decoy letters, and upon the theory that decoys are permissible to entrap criminals, but not to create them, and not to ensnare the law-abiding citizen into unconsciously offending, the petitioner here should have been discharged.

U. S. v. Healy, 202 Fed. 349;

Woo Wai v. U. S., 223 Fed. 412;

Sam Wick *et al.* v. U. S., 240 Fed. 60.

Every *bona fide* letter sent from the office of this defendant, where the mail business and the conduct of the mail matters was handled in exactly the same manner and under the same directions as in the office where this defendant was employed, stated to the patients to whom such letters were written that they MUST COME TO THE OFFICE for examination, which statements are in contravention of the things alleged in the indictment; and in view of this can it be said that such correspondence is not *competent* evidence in this case? Letters of Dr. Freeman to patients were what the whole case consisted of in theory. Admit these legitimate letters in evidence; let the jury pass on the question of their weight in determining the guilt or innocence of the accused; from the defendant's state of mind at the time he wrote them let the jury infer what his state of mind was at the times alleged in the indictment, and what is left of the Government's case? Merely advertisements in the Los Angeles Examiner. And what does the case then amount to? Merely a prosecution of a professional man for advertising. Is it any wonder that counsel for the Government objected to their admission, knowing full well that having had his "decoy letters" and their effect counteracted by the legitimate correspondence, his case could not stand on the mere advertisement alone? In this regard the particular attention of this court is called to the testimony of Postoffice Inspector C. E. Webster [Transcript, page 105, lines 26 to 30, inclusive], as follows:

"I saw *bona fide* letters written from that office, that is, letters that were not decoy letters, and I have them

in my files. I have one and possibly more. I got that one from the party to whom it was addressed."

Now this was from the Government's own witness, a man who had personally investigated and, to use his own language, "worked this case up." If the counsel for the Government was so anxious to lay all the facts before the jury and see that justice was done, why did he not have his star witness produce such letter or letters? We are forced to the conclusion that such letter or letters were either not in existence, or if they were, they were so favorable to the defense that the Government did not dare produce them. We urge most strongly upon this court that it was the most serious and grave error to deny the admission of the defendant Freeman's correspondence.

III.

The Trial Court Erred in Giving and Refusing to Give Certain Instructions to the Jury

In instructing the jury of its own motion, the trial court said [in instructions 12 and 13—Transcript, page 201, lines 9 to 12 and 27 to 30, inclusive]:

"In other words, if the conspiracy existed, it does not matter what the government officers did in order to procure evidence to prove it. * * * You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action."

We most strongly urge that the giving of these parts of these two instructions was error of the gravest kind,

and their effect upon the minds of the jury was incalculable. While there is no doubt but IF THE CONSPIRACY EXISTED, the conduct of the officers in securing evidence to prove it was of little moment. BUT THE EXISTENCE OF SUCH CONSPIRACY WAS A MATTER FOR THE JURY ALONE TO DETERMINE, and if they should decide that IT DID NOT EXIST, what then of the decoy letters and the replies thereto? They most certainly would be a defense and a complete one at that. We deem it unnecessary at this time to quote authorities upon such a plain, well-known statement of law. In its opinion the Appellate Court states that the conspiracy MUST HAVE EXISTED INDEPENDENTLY of the decoy letters and in almost the same breath holds that such letters and the replies thereto must be taken as evidentiary of the fact of the conspiracy. We submit that such letters and replies are not evidentiary, but that they are to be considered, if anything, as mere overt acts. And until the conspiracy was proven, or at least until a *prima facie* case presented, they could not, and should not, have even been admitted in evidence. We submit that the trial court overstepped its authority when it instructed the jury, even though by inference, that the conspiracy had been proven to exist independently of such letters; and for these reasons urge that the instructions, more especially No. 13, were erroneous.

We respectfully ask this court, in order that a miscarriage of justice shall not be made permanent, to grant a rehearing to the defendant Freeman, to enable

him to elaborate upon the errors above cited, and to quote ample points and authorities sustaining each and every one of the same.

Respectfully submitted,

M. E. MEADER,

Attorney for Gideon M. Freeman, Plaintiff in Error.

C. W. PENDLETON,

Of Counsel.

State of California, County of Los Angeles—ss.

I, M. E. Meader, do hereby certify that I am now, and at all stages of the proceedings in this court have been, an attorney and counsel for Gideon M. Freeman, one of the plaintiffs in error in the within entitled action, and in my judgment the foregoing petition is well founded, and is not interposed for the purpose of delay.

M. E. MEADER. 130

